

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 148

CHARLES S. FAIRCHILD, APPELLANT,

vs.

**BAINBRIDGE COLBY, AS SECRETARY OF STATE OF THE
UNITED STATES, AND A. MITCHELL PALMER, AS AT-
TORNEY GENERAL OF THE UNITED STATES.**

**APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.**

FILED OCTOBER 6, 1921.

(27,929)

(27.929)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. 572.

CHARLES S. FAIRCHILD, APPELLANT,

vs.

BAINBRIDGE COLBY, AS SECRETARY OF STATE OF THE
UNITED STATES, AND A. MITCHELL PALMER, AS AT-
TORNEY GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY, Sec'y., &c., et al.

Supreme Court of the District of Columbia.

No. 38035. In Equity.

CHARLES S. FAIRCHILD, Complainant,

vs.

BAINBRIDGE COLBY, as Secretary of State of the United States, and
A. MITCHELL PALMER, as Attorney General of the United States,
Defendants.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill for Injunction.

Filed July 7, 1920.

In the Supreme Court, District of Columbia.

No. 38035. Equity.

CHARLES S. FAIRCHILD, Complainant,

against

BAINBRIDGE COLBY, as Secretary of State of the United States, and
A. MITCHELL PALMER, as Attorney General of the United States.

To the Honorable the Chief Justice and Associate Justices of the
Supreme Court of the District of Columbia:

Charles S. Fairchild brings this bill of complaint for himself and
on behalf of the members of the American Constitutional League,

against the defendants above named, and respectfully shows unto this Honorable Court:

I. Complainant is a citizen and resident of the State of New York, and that the defendant, Bainbridge Colby, is a citizen of the State of New York and a resident of Washington in the District of Columbia and is Secretary of State of the United States; and that the defendant A. Mitchell Palmer is a citizen of the State of Pennsylvania and a resident of Washington in the District of Columbia and is Attorney General of the United States.

II. That the said association is composed of citizens of the States of Arkansas, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Rhode Island and Virginia, and has an office in the city of New York and also in the city of Washington in the District of Columbia. That they are taxpayers in their respective States and each of them, with one exception, has the right to exercise the elective franchise therein. The said League was organized in the year 1917 for the following purpose: to "Uphold and Defend the American Constitution against all Foreign and Domestic Enemies." Since then it has been engaged in an active campaign in the United States for the diffusion of knowledge as to the fundamental principles of the American Constitution and especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein.

The question involved in this suit is one of common or general interest to all the members of said association and they constitute a class so numerous as to make it impracticable to bring them all before the Court, and this complainant therefore sues for the whole class.

III. That this is a suit in equity of civil nature and arises under the Constitution and laws of the United States, especially under Section Four of Article Four and under Article Five of the Constitution, and Articles Nine and Ten of the Amendments to the Constitution. It is for the purpose of enjoining the defendant from issuing a proclamation declaring the ratification of the so-called Suffrage Amendment in reference to the right of suffrage within the several States of the United States.

IV. And in support of its bill the complainant alleges as follows:

The State of Virginia was settled by subjects of the British Crown in the year 1608.

The State of Massachusetts was settled by subjects of the British Crown in the year 1620.

The State of Rhode Island was settled by subjects of the British Crown in the year 1636.

The State of New Jersey was settled by subjects of the British Crown in the year 1682.

3 The territory now comprising the State of New York was ceded in 1664 to the British Crown and was thereafter settled by subjects of the said Crown.

Said colonists from the beginning exercised and enjoyed the inherent right of self-government in the management and control of their own affairs as a community, and especially in the regulation of

suffrage in the various elections which were from time to time held by them for the selection of officers to administer their civil institutions.

V. In consequence of the assertion by the colonists of said several States that they of right possessed full legislative powers in all matters relating to internal affairs of said colonies and the denial thereof by Great Britain, the said colonies in 1776 severed their connection with Great Britain and abrogated their allegiance to the British Crown.

The Representatives of the United States of America in General Congress assembled did on the Fourth day of July, 1776, declare their independence and thereupon the said several colonies became free and independent sovereign States, and succeeded to those public rights belonging by prerogative to the British Crown and exercised by Parliament that in any way pertained to the government and affairs of said States, and particularly to the exercise of the elective franchise.

VI. That each of said States severally maintained the right of exercising complete legislative powers over its internal affairs with its existence as a free, independent and sovereign State and at the conclusion of the war its freedom and independence were acknowledged by Great Britain in the Treaty of Peace signed at Paris, September 3, 1783. They joined with the other several States in a league of friendship but did not surrender any legislative power over their internal affairs and civil institutions.

VII. By the ratification of the Constitution of the United States by the ninth State on June 21, 1788, the United States of America under the Articles of Confederation ceased to exist, and the United States of America under the Constitution of the United States came into being. And the said Constitution of the United States was ratified by said several States. Each of said States thereby became a sovereign State of the United States under the said Constitution. And said act of ratification by the people of said States was in good faith, and with full assurance that said State and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purpose of, and with only the powers enumerated, in the several articles of the said Constitution, and that all other powers not delegated nor prohibited to the several States were reserved to the said several States and to the sovereign people thereof. The several conventions of the said States at the time of adopting the Constitution of the United States, and especially the conventions of Massachusetts, New York, Pennsylvania and Virginia, expressed the desire in order to prevent the misconstruction or abuse of the powers of the United States Government, that further declaratory and restrictive clauses should be added. Said Constitution would not have been ratified nor gone into effect had it not been for the general understanding on the part of the people of the several States, and especially the States last mentioned, that certain limitations of powers of the new Government created by said Constitution should be expressed in amend-

ments thereto, which should state the fundamental rights of said States and of the people thereof and should operate as permanent limitations upon the powers of the said general Government.

VIII. In accordance with said understanding and in compliance with the desire expressed by the said conventions, the Congress of the United States, begun and held on the Fourth day of 5 March, 1789, adopted a joint resolution, in which after reciting the action of the several conventions hereinbefore alleged, it proposed ten certain articles of amendment to the said Constitution, which said amendments were in the nature of a bill of rights, declaring the fundamental principle that the powers of the Federal Government created by said Constitution were not unlimited, but were confined to those expressed in the Constitution itself as limited by the bill of rights formed by the said several Constitutional Amendments. The Ninth and Tenth Articles of said Amendments are as follows:

IX. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

IX. The complainant is advised and therefore avers that the Constitution of the United States does not delegate to the Government of the United States, nor to the people of the United States, any power to regulate the elective franchise with regard to the internal affairs of said several States of the American Union, nor is said power with respect to the internal affairs of the said States prohibited by the said Constitution to the said States, but is expressly reserved to said States, respectively and to the sovereign people thereof. And further, that neither the power with respect to the elective franchise of said States, nor the discretion in the exercise thereof, can be surrendered or transferred effectively to bind the people of said States and their posterity without an explicit and authentic act of all the people of said States.

X. In and by Section Four, Article Four, of the Constitution of the United States, it is provided that "The United States shall 6 guarantee to every State of this Union a republican form of government." It is an essential part of a republican form of government of such State that it shall regulate the exercise of the elective franchise by the citizens thereof with reference to the internal affairs and government of said States.

XI. The State of Arkansas was admitted in the Union of the United States in the year 1836. The State of Missouri was admitted in the Union of the United States in the year 1821. Both these States applied for admission to the Union of the United States upon the basis and faith of the Ninth and Tenth Amendments to the said Constitution which are hereinbefore set forth, and retained for themselves, severally, the right of local self-government and especially the right to regulate the exercise of the elective franchise in all elections to be held within said States, and particularly for the officers of the State governments thereof and for their respective legislatures.

XII. The Constitution of the State of Missouri provides and has for over thirty years provided as follows:

"Article II, Section 3, We declare, That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to coexist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

XIII. Complainant is advised and therefore avers that the power exercised by Congress in enacting the said Joint Resolution, pretending to submit thereby to the legislatures of the several States of the United States the so-called Suffrage Amendment, as afore-

7 said, was not delegated to Congress by the provisions of Article V of the Constitution of the United States, and the exercise by Congress of the power to enact such joint Resolution, as aforesaid, was a proceeding unconstitutional and void; and further, that the proposal of the so-called Suffrage Amendment as aforesaid, is not a proposal of an amendment to the Constitution of the United States within the intent, purview, and scope of Article V of the Constitution of the United States, but is an unconstitutional and revolutionary proposal to the legislatures of the several States of a revision and addition to the said Constitution, that is destructive of the fundamental principles thereof and of the Government established thereby, under the form and guise of a proposal of a valid amendment to the Constitution of the United States and under the form and pretense of complying with constitutional procedure; and further, that the proposal of the so-called Suffrage Amendment, for the reasons aforesaid, and otherwise, was unconstitutional, inoperative and void.

XIV. Although the proposal of said last mentioned amendment to the Constitution of the United States, as hereinbefore averred, was unconstitutional, inoperative and void, yet, nevertheless, the legislatures of thirty-four States of the United States have gone through the form of ratifying the same, and the said several thirty-four States have caused their several pretended ratifications to be certified to the Secretary of State of the United States. The facts as to West Virginia are hereinafter more specifically stated.

XV. The governments of the said several States now composing the United States of America are, and each of them is, republican in form, and each of them has from the beginning of the Union exercised the power to regulate the elective franchise within said State:

8 said power was recognized in Section II, Article I, of the Constitution of the United States, in which it is declared that the electors in each State of the House of Representatives of the United States shall have the qualifications requisite for electors of the most numerous branch of the State Legislature. It was again recognized by the Congress of the United States and by the people of the several States in and by the proposal of the Seventeenth Article

of Amendment to said Constitution, which was declared to have been ratified in a proclamation by the Secretary of State, dated May 21, 1913. This provides that the electors of Senators in "each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

XVI. In pursuance of the said right of the people of each State to regulate the government of said State and the administration of its internal affairs, the people of each of the said States have adopted by popular vote written constitutions, in which among other things, the manner in which the legislature of each State shall be constituted is prescribed. In several of said States, particularly in the States of Maine, Ohio, Massachusetts, Maryland, Oklahoma, Colorado, California, Washington and others, it is provided in various forms of expression, but to substantially the same effect, that a certain number, varying in the different States, of the electors thereof, shall have the right by petition to require that any act of the legislature thereof (or, as in some, any law passed by the legislature thereof) shall be submitted to the vote of the electors of said State respectively, and that said act or law, after the filing of such petition within the required number of days shall be inoperative and of no effect (or, as in some, shall be inoperative after having been rejected at the polls by a majority of the electors voting thereon). The recent decision by the Supreme Court of the United States declaring

9 unconstitutional such provisions for referenda upon Federal amendments overlooked the fact that the intent and purpose are more vital than wording, and that, as shown by the official letter of transmittal of the original Constitution, directing that it should be submitted to conventions in each State chosen by the people thereof, and the decision of Justice Marshall in the case of *McCulloch vs. Maryland*, in which he declared that the Constitution was not submitted to the States but to the people, evidently the purpose was to obtain the will of the people by the best possible means, which was at that time through legislatures which were willing to represent the people in the matter of altering their own law.

In each of the States of the Union except Delaware, it is provided by the Constitution thereof that no amendment to such Constitution shall be valid unless the same is submitted to the electors of said State for their approval at an election regularly held, and is approved by them upon such election.

XVII. In certain of the States, the legislatures of which have adopted resolutions purporting to ratify said Suffrage Amendment—to wit, in the States of Wisconsin, Ohio, Pennsylvania, New Jersey, Massachusetts, Nebraska, North Dakota, Texas, Missouri, Arkansas and Maine, the right of citizens to vote was restricted by the several constitutions of said States to citizens of the male sex, and the several Constitutions of said last mentioned States conferred no power upon the legislatures of said States respectively to amend the Constitutions of such States, but require that in all cases a proposed amendment to such Constitution must be submitted to the vote of the people of said States respectively. Nevertheless the legislatures of said States, in violation of the Constitution thereof, failed, and refused to sub-

mit to the vote of the people of such State the said Suffrage Amendment which purports to and would if enforced alter the constitution of said State without the consent of the people of the said States respectively as required by their respective constitutions. In the States of Ohio, New Jersey, North Dakota, Nebraska, Missouri, Massachusetts, Maine, West Virginia and Texas, a proposition to amend the constitution of said States respectively so as to give to women the right to vote, was submitted to the vote of the people of said States respectively at divers times during the six years last past, and was in each case defeated by the vote of the people of said States respectively.

XVIII. (1) In addition to the 34 States hereinbefore referred to the executive officers of which have respectively certified to the defendant that the legislatures of the said States have ratified the said Suffrage Amendment, the defendant herein named has received such a certificate purporting to come from the proper officer of the State of West Virginia. On the first day of March, 1920, the said amendment was voted upon by the Senate of West Virginia, and was defeated. On the third day of March, a motion to reconsider the vote by which the same was defeated was made, and was defeated. Under Rule 52 of the West Virginia Senate no measure once defeated and then reconsidered can be acted upon during the session. Under Rule 69 of the West Virginia Senate a vote of two-thirds of the Senate is required to suspend any rule. A provision in the Constitution of said State requires a two-thirds vote to expel a member. Nevertheless, on the tenth day of March, 1920, the Senate of said State by a bare majority voted to unseat and expel Senator A. R. Montgomery, who was a member of the said Senate. Thereupon the said Senate, without suspending Rule 52, hereinbefore alleged, attempted again to act on the said Suffrage Amendment, and passed a resolution purporting to ratify it by a vote of 15 in favor and 14 against. Said Senator Montgomery was opposed to the said resolution, and would have voted against it had he been allowed to do so. Another section of the Constitution of West Virginia provides that any Senator or Delegate who removes from the County or District for which he has been elected during his term of office, shall thereby lose his seat. A certain Raymond Dodson, one of the Senators from the Fourth Senatorial District of that State, from which he had been elected, removed from the County of Roane in which he had resided and which formed a part of that district, removing during the year 1919, and had taken up his residence in the County of Kanawha, where he still resided at the time he was recorded as voting in favor of said resolution. The respective pertinent sections of the Constitution of West Virginia and of the rules of her Senate are filed herewith as an exhibit marked "Complete Exhibit, Constitution, and Rules of the Senate, of West Virginia" and prayed to be considered a part hereof. The complainant is advised and alleges that the said resolution of ratification so purporting to have been passed by the Legislature of West Virginia, was not in fact passed by the Senate or by the Legislature of that State.

XVIII. (2) The complainants are advised and believe and therefore aver that while the Legislature of each State is constituted by and under the Constitution of such State, and only has legal or constitutional existence in so far as it conforms to such Constitution, yet the power of any legislature so constituted to ratify amendments to the Constitution of the United States when duly proposed by the Congress is derived from Article V of the Constitution of the United

States, and being so derived is to be regarded as having been granted to such legislature by the people of the United States.

Every citizen of the United States of whatever State he may be a citizen, and particularly every citizen of the State of West Virginia, is entitled to have the question of ratification of an amendment to the Federal Constitution submitted to and voted upon by all the legally and constitutionally elected and duly qualified members of the legislature of that State present and offering to vote, and by none other than such duly elected and qualified members of the legislature; and the complainants believe and aver that the said amendment has not been ratified by the vote of all such members, but that as hereinbefore shown, the Senate of West Virginia at the time of its so-called ratification of said amendment had been depleted and also added to, in each case contrary to the fundamental laws of its creation, and that its established rules of procedure had been illegally and unconstitutionally violated and that consequently its alleged act under and in pursuance of Article V of the Constitution of the United States is not the act of a legislature of a State as therein mentioned but is a mere nullity.

XIX. Under the laws of Arkansas, Massachusetts, Missouri, New Jersey, Pennsylvania, Rhode Island and Virginia the right to exercise the elective franchise is not conferred upon citizens of the female sex. In those States the number of women who are citizens is about the same as that of men. The addition to the electorate of that great number of voters would nearly double the expense of the elections which are held from time to time in said States and would impose in each State a heavy financial burden upon the persons on whose behalf this bill is filed, who are severally taxpayers thereof and would be an injury to them.

XX. Under the Constitutions and the laws of the several States mentioned in the next preceding Article and also under the Constitution and laws of the State of New York, the several provisions of the Constitutions thereof may be amended from time to time by the people of said States. If the said Suffrage Amendment to the Constitution of the United States should go into effect and operation this right now inherent in said States and the citizens and electors thereof will be divested of one of the most important portions thereof, to wit, the regulation of the elective franchise, to the great injury of complainant and his associate members for whom he brings this suit.

XXI. Under the laws of the United States a woman who is not a citizen thereof becomes immediately a citizen upon her marriage to a person who is a citizen thereof without any required period of residence nor any examination as to her qualifications for citizen-

ship. In the States mentioned in the preceding Article there are many such women who do not read or speak the English language and are not familiar with our institutions and many of whom are opposed to such institutions and desire to subvert the same. The addition of these persons to the electorate which is proposed by the said Suffrage Amendment would work grievous injury and impose a heavy financial burden upon the persons on whose behalf this bill is filed who are severally taxpayers in the States of which they are respectively citizens.

XXII. The persons on whose behalf this bill is filed, who are citizens of the States of Arkansas, Maryland, Massachusetts, Missouri, New Jersey, Pennsylvania, Rhode Island, Virginia and West Virginia, are respectively entitled to the right of suffrage at all elections held under the Constitutions and laws of their res-

14 spectively States, and such right is valuable and is protected by law. Each of said citizens by virtue of his said Constitutional and legal right to vote participates in the government of the State on equal terms with the other qualified electors thereof and bears his due proportionate share of responsibility for the election of members of the legislative, executive and judicial branches of his State government and his municipal and other local officials, and for the approval or disapproval of all such measures, whether Constitutional amendments, municipal charters, public loans or other propositions that may be from time to time submitted to the qualified electors of such State or the subdivisions thereof, and each of said complainants has therefore an interest that his vote at all such elections be accorded its due weight, and not be subject to be nullified or rendered ineffective by the illegal or unconstitutional addition to the electorate of such State of any persons or classes of persons who are not entitled under its Constitution and laws or under the Constitution of the United States, and laws enacted in pursuance thereof to vote. And the effect of the threatened action of the defendant in proclaiming as having been ratified the so-called Suffrage Amendment, should one more State Legislature ratify the same, without regard to the illegality and nullity of the alleged ratifications by West Virginia and Missouri, and without regard to the nullity of the resolutions of the Congress proposing such Amendment, will be to diminish and impair the value, responsibility and dignity belonging to the right of suffrage possessed by each of the said persons on whose behalf this bill is filed.

XXIII. The defendant, the Secretary of State of the United States, has publicly declared in response to requests from various citizens and associations thereof, that he has no power under
15 the laws of the United States to examine into the validity of any acts of ratification purporting to have been adopted by the several States, and has declared further that upon receiving from the Secretary of State of any one additional State of the United States, a certificate that the said Suffrage Amendment has been ratified by the Legislature thereof, he, the defendant, will issue a proclamation declaring that the said Suffrage Amendment has been ratified by a sufficient number of States, and has become valid to all

intent and purposes as a part of the Constitution of the United States.

XXIV. Complainant is advised and therefore avers that the power exercised by each of the legislatures of the several States of the United States in enacting an alleged ratification of the so-called Suffrage Amendment, as aforesaid, was not delegated to the legislatures of the several States and that the enactment by them respectively of alleged ratification of the so-called Suffrage Amendment by each of the legislatures of the several States, as aforesaid, was not a ratification of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but was an unconstitutional and revolutionary proceeding in reference to a revision of and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a ratification of a valid amendment to the Constitution of the United States, and under the form and pretense of complying with constitutional procedure; and further, that the alleged ratification of the so-called

16 Suffrage Amendment by each of the legislatures of the several States, for the reasons aforesaid, and otherwise, was unconstitutional, inoperative and void.

XXV. And complainant is advised and therefore avers that the Congress of the United States and the Legislatures of the several States of the United States are the representatives and agents of the people of the United States in proposing and ratifying amendments to the Constitution within the intent, purview and scope of Article V of the Constitution of the United States; and within the intent, purview and scope of the original delegation of powers to the people of the United States under the Constitution of the United States; and that the alleged proposal by Congress, as aforesaid, and the alleged ratification by the legislatures of the several States, as aforesaid, were not within the scope of the original delegation of powers by the people of the United States, and were not within the power and authority of Congress and the legislatures as agents of the people of the United States or of the several States; and further, that the Congress of the United States and the legislatures of the several States as aforesaid, are neither the judges of their respective powers nor of the limitations thereof under the Constitution of the United States.

XXVI. The Governor of the State of Maryland submitted the proposal of the so-called Suffrage Amendment aforesaid to the Legislature of the State of Maryland. Such Legislature refused to adopt any resolution in alleged ratification of the so-called Suffrage Amendment to the Constitution of the United States, and refused to entertain the proposal of said amendment as a valid proposal of amendment. And the State of Maryland has ever asserted and now
17 asserts that the proposal of the so-called Suffrage Amendment is not a valid proposal of an amendment to the said Constitution, and that the Legislature of the said State and the legislatures of the other States composing the Federal Union

have no power of their own to ratify or approve the said amendment as a valid amendment to the Constitution of the United States. And the people of each of the States of Massachusetts, New Jersey, Pennsylvania and Missouri, when a proposed amendment to the Constitution of said States was submitted for adoption to popular vote aforesaid, respectively rejected the same.

XXVII. (1) Although the proclamation by the Secretary of State of the United States will not be valid in fact or law, yet it will upon the face thereof, under the Great Seal of the United States, be *prima facie* valid, and will receive consideration and be trusted as authority in many of the States of the United States in making the provision required by law in reference to the general election which is to be held in the several States on the first Tuesday in November next. It will produce great confusion and be the cause of irreparable injury if the validity of such threatened proclamation should remain in doubt pending the making of a provision for the said election so to be held, and especially in those States whose constitutions severally grant the right of the exercise of the elective franchise in State elections only to the male citizens of said States having certain other qualifications defined by said States respectively, and not to the female citizens of such States. The States of the United States whose constitutions so provide are as follows: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Jersey, New Mexico, North Dakota, North Carolina, Ohio, 18 Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, Minnesota, Mississippi, Vermont, New Hampshire and Wisconsin. The various officers of election who under the constitution of said last mentioned States are charged with the duty of making provision for the holding of such election, and amongst other things for the registry of persons entitled to vote, are required by the constitutions of said States to take oath to support the constitution thereof.

Although the threatened proclamation of the ratification of said amendment would not be conclusive as to the validity of such ratification or of the said amendment, nevertheless the effect thereof will be to cause election officials in States under whose constitution the suffrage is confined to persons of the male sex, including those of which many of the persons on whose behalf this suit is brought, are citizens, voters and taxpayers, as hereinbefore stated, to proceed to accept as qualified voters in the next ensuing elections great numbers of persons of the female sex not qualified by the laws and constitutions of such States respectively or by the laws and Constitution of the United States to vote; and the ballots cast by such persons will be indistinguishable from the ballots cast by the duly qualified voters of such States, including the said persons on whose behalf this suit is brought, and the said action of the Secretary of State will cause irremediable mischief in that the ensuing elections for all State officers to be chosen in such States respectively and for Senators and Representatives in Congress and for electors for President and Vice-President of the United States from such States will in fact

be open to the participation of a great number of persons not legally or constitutionally qualified as electors, and wishes of a majority of the qualified electors will not then or thereafter be ascertained or ascertainable, and the said elections in all such States will be invalid and void; and the rights of persons on whose behalf this suit is brought, to vote at such elections and to have their votes given effect in ascertaining the results thereof will be impaired or destroyed, and such persons will thereby in effect be deprived of their right to vote at such elections, and of their right as free citizens to the due holding of such elections and the choice of officers, members of the Congress and Presidential electors in a legal and constitutional manner.

XXVII. (2) The said Suffrage Amendment contains the following language:

"Congress shall have power to enforce this article by appropriate legislation."

On May 4, 1920, a force bill (S. 4323) was introduced by Senator Watson, of Indiana, providing a fine of five hundred dollars or one year's imprisonment for any person who refuses to allow women to vote, "any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

If the above measure should be passed, the second mentioned defendant, A. Mitchell Palmer, as Attorney General of the United States, would be empowered and required by law to enforce the provisions of said act, and as hereinbefore shown, to the great injury of the complainant and of the members of the association for whom he brings this suit.

XXVIII. Complainant is informed and believes, and therefore avers that in two of the States which have purported to ratify the said Suffrage Amendment, namely, Arkansas and New Hampshire, no resolution ratifying said Amendment was passed in both houses of the Legislatures of either of said two States; but that separate and distinct resolutions were acted upon by the two Houses, and that since a resolution must pass both Senate and House of Representatives of said Legislatures, the resolutions which were passed by only one house each are null and without legal effect.

XXIX. Article V of the Constitution of the United States declares that "Congress whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution," etc. The vote by which said Suffrage Amendment was purported to have been passed was in the Senate of the United States only fifty-six, or eight less than two-thirds of the entire membership of that body. In three places in the Constitution of the United States where two-thirds of a *quorum* are signified, the word "present" is used. In the decision recently given by the Supreme Court of the United States, a former decision was upheld in which the words "two-thirds," as used in Article V, meant two-thirds of a *quorum*; but complainant is informed and believes, and therefore avers that the ruling was based solely upon the trend of precedent of the State Supreme

Courts, and that of the six State decisions quoted, five are directly contrary to the decision of the Supreme Court of the United States which based its decision thereon.

XXX. In and by Article II, Section 32 of the Constitution of said State of Tennessee it is provided that

"No convention or General Assembly shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such amendment has been submitted."

21 The Legislature of Tennessee now in existence was elected by the people of said State in the year 1918, before the proposed Suffrage Amendment had been proposed by the Congress or submitted to the Legislatures of the several States. It therefore has no power to act upon said Amendment; and it is not now in session. Nevertheless the Governor of said State has called a special session of said Legislature for the purpose of ratifying said Suffrage Amendment, the same to meet upon August 9, 1920. If said special session should pass a resolution purporting to ratify said Suffrage Amendment the Secretary of State of Tennessee would transmit a certificate thereof to the Secretary of State of the United States, and he would thereupon issue a proclamation declaring that the said Suffrage Amendment had been duly ratified by thirty-six States and had become a part of the Constitution of the United States. All of which would be to the great injury of this complainant and the members of the association for whom he sues, and would bring an additional element of uncertainty into the ascertainment of the citizens having the right of suffrage in the various States mentioned in the aforementioned paragraph whose Constitutions do not confer the right of suffrage upon female citizens, and would occasion a multiplicity of suits to test the result of the several elections held in these States, respectively. Whereas in the orderly administration of justice, and in accordance with due process of law, the validity of the ratification of said Amendment should be determined by a competent judicial tribunal before the elections, which may then be held and conducted in accordance with the decision of such tribunal.

If the election is held without any judicial determination of the question hereinbefore mooted, as to the validity of such so-called

22 Suffrage Amendment, the validity of any election which may be held pending the determination of the controversy aforesaid will respecting the same become a source of dispute and will lead to a multiplicity of suits. All of which would be to the irreparable injury and damage of the people of the States of which the members of said association are respectively citizens and of this complainant and of the people of the United States.

Forasmuch as complainant is without remedy at law and its only protection in the premises must arise from the equitable jurisdiction of this Court, wherein is vested the duty and power to interpret and enforce the provisions of the Constitution of the United States, and to the end that it may obtain relief to which it is by right in equity entitled.

Wherefore, the complainant respectfully prays this Honorable Court to grant unto it a writ of subpoena, to be directed to the said Bainbridge Colby, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States, the defendants herein named, requiring them to appear and answer hereto, but not under oath, the answer under oath being hereby expressly waived. That the so-called Suffrage Amendment be declared unconstitutional and void. That the defendant, Colby, his assistants, subordinates and agents be enjoined and restrained, both pending this suit and also by the final decree therein, from issuing any proclamation declaring that the said so-called Suffrage Amendment has been ratified or that it has become a part of the Constitution of the United States. That the defendant, Palmer, his assistants, subordinates and agents be enjoined and restrained, both pending this suit and also by the final decree therein, from enforcing said Amendment. And that complainant may have such other and
23 further relief as to this Court may seem just and equitable in the premises. And that the rule to show cause issue direct to the defendants demanding them to show cause, if any they have, why the restraining order should not issue.

ALFRED D. SMITH,

EVERETT P. WHEELER,

Attys for Pltffs.

24 *Complete Exhibit, Constitution and Rules of the Senate of West Virginia.*

The Constitution.

Article Six, Section Twelve:

"No person shall be a Senator or Delegate who has not for one year next preceding his election been a resident within the District or county from which he is elected; and if a Senator or Delegate remove from the District or county for which he was elected, his seat shall be thereby vacated."

Article Six, Section Twenty-five:

"Each House may punish its own members for disorderly behavior, and with the concurrence of two-thirds of the members elected thereto, expel a member, but not twice for the same offense."

The Rules of the Senate.

Rule Fifty-two:

"The question, being once determined, must stand as the judgment of the Senate, and cannot during the session be drawn again into debate unless reconsidered, and it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding business days."

Rule Sixty-nine:

"No standing rule or order of the Senate shall be rescinded or changed without one day's notice being given of the motion therefor; and no rule shall be suspended except by a vote of two-thirds of all the members of the Senate present."

25 Paul Morris, after being first duly sworn according to law, deposes and says that he is the agent of the plaintiff, who is absent from the jurisdiction, and knows the contents hereof; that the facts herein stated of his own knowledge are true and that those stated upon information and belief he believes to be true.

PAUL MORRIS.

Sworn and subscribed to before me this 7th day of July, A. D. 1920.

[SEAL.]

GEO. P. NEWTON,
Notary Public, District of Columbia.

ALFRED D. SMITH,
Att'y for Plff.

26 *Memorandum*

July 7, 1920.—Rule to show cause, issued.

Return to Rule to Show Cause.

Filed July 13, 1920.

* * * * *

For a return to the rule to show cause why an injunction *pendente lite* should not issue in this cause, the defendants Bainbridge Colby, Secretary of State of the United States, and A. Mitchell Palmer, Attorney General of the United States, say as follows:

1. The bill of complaint sets forth no equity whereon to ground the relief prayed or any relief whatever.

2. The bill of complaint herein presents no emergency calling for injunctive relief.

3. For other and further reasons apparent upon the face of the said bill of complaint.

WM. L. FRIERSON,
The Solicitor General;
JOHN E. LASKEY,
Attorney of the United States
in and for the District of Columbia,
For the Defendants.

Motion to Dismiss.

Filed July 13, 1920.

* * * * *

Now come Bainbridge Colby, Secretary of State, and A. Mitchell Palmer, Attorney General of the United States, and move the Court to dismiss the bill of complaint herein, for the causes following:

27 1. Because the plaintiff, by his bill, discloses no interest or privity which entitles him to maintain the same or obtain relief thereby.

2. Because there is no equity in the bill.

3. For other and further reasons apparent upon the face of the bill of complaint.

WM. L. FRIERSON,

The Solicitor General;

JOHN E. LASKEY,

*Attorney of the United States**in and for the District of Columbia,**For the Defendants.**Final Decree.*

Filed July 14, 1920.

* * * * *

This cause came on at this term to be heard, pursuant to stipulation in open court, upon the motion to dismiss the bill as well as upon the rule to show cause why a preliminary injunction should not be issued as prayed in the said bill; Whereupon, the said motion to dismiss is granted and the said rule is discharged.

It is, therefore, this 14th day of July, A. D. 1920,

Adjudged, ordered and decreed, that the bill of complaint herein be, and the same hereby is, dismissed, and that the defendants recover of the plaintiff their costs of suit.

By the Court:

JENNINGS BAILEY,

Justice.

28 From the foregoing decree the plaintiff notes an appeal to the Court of Appeals and the penalty of the bond and undertaking on appeal is fixed at one hundred dollars, with leave to the plaintiff to deposit fifty dollars cash in lieu thereof.

By the Court:

JENNINGS BAILEY,

Justice.

Form approved.

ALFRED D. SMITH,

EVERETT P. WHEELER,

Of Attorneys for Plaintiff.

Memorandum.

July 21, 1920. \$50 deposited by plaintiff's attorney in lieu of appeal bond.

Assignment of Errors.

Filed July 21, 1920.

* * * * *

Now comes the complainant in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by this honorable court on the 14th day of July 1920.

1. The Supreme Court of the District of Columbia erred in granting the motion made by defendants to dismiss the bill filed in the cause.

2. The said Court erred in holding that the plaintiff by his bill discloses no interest or privy entitling him to maintain the same or obtain relief thereby.

3. The said Court erred in holding that there was no emergency calling for the issue of an injunction therein.

4. The said Court erred in holding that there was no limit to the power to amend the Constitution of the United States granted by the fifth article thereof.

5. The said Court erred in holding that the ninth and tenth amendments to the Constitution of the United States did not limit in any way the power to amend granted in the fifth article thereof.

6. The said Court erred in holding that there was no limit by any implication to the power to amend granted by the fifth article of the said Constitution.

7. The said Court erred in holding that the pending Suffrage Amendment mentioned in the bill, if ratified, would not in any way violate the guarantee of the Republican form of government contained in section 4, article IV, of the said Constitution.

8. The said Court erred in holding that the respective Constitutions of the States of Missouri and Tennessee, mentioned in said bill, were not binding upon the respective legislatures of the said States in any action they might take upon the submission to the States of an amendment of the Constitution of the United States, and that the said legislatures could act upon the same irrespective of any requirements or limitations imposed by the said constitutions of said States respectively.

9. The said Court erred in holding that it had no power to consider or examine the validity of any ratification by any particular legislature of an amendment proposed to the Constitution of the United States.

10. The said Court erred in holding that it had no power to con-

30 sider the allegations of the bill respecting the action of the Legislature of the State of West Virginia, in respect to the ratification of said suffrage amendment.

11. The said Court erred in holding that it was competent for the majority of the States of the Union, as expressed in the fifth article of the Constitution of the United States, to impress upon the minority of the States forming a part of said Union changes in their respective Constitutions without conformity to the methods fixed by the said State Constitution for making such changes.

12. The said Court erred in holding that there was no equity in said bill.

Wherefore the appellant prays that said decree be reversed and that said Supreme Court for the District of Columbia be ordered to enter a decree reversing the decision of the said court in said cause.

ALFRED D. SMITH,
EVERETT P. WHEELER,
Attorneys for Appellant.

Designation of Record.

Filed July 21, 1920.

* * * * *

Bill of Complaint.
Memorandum of rule.
Memorandum of return to rule.
Motion to Dismiss.
Final Decree.

ALFRED D. SMITH,
EVERETT P. WHEELER,
Attorneys for Plaintiff.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 38035 in Equity, wherein Charles S. Fairchild is Complainant and Bainbridge Colby, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of August, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,

Clerk.

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3432. Charles S. Fairchild, appellant, vs. Bainbridge Colby, sec'y, &c., et al. Court of Appeals, District of Columbia. Filed Aug. 3, 1920. Henry W. Hodges, clerk.

(1983)

Addition to Record.

Court of Appeals of the District of Columbia, October Term, 1920

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY, as Secretary of State of the United States, et al.

Appeal from the Supreme Court of the District of Columbia.

Filed September 16, 1920.

In the Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

v.

BAINBRIDGE COLBY et al., Appellees.

This stipulation entered into this 16th day of September, 1920, by and between the United States District Attorney, representing the Appellees, and Alfred D. Smith, attorney for the Appellant, whereby it is stipulated and agreed that it was understood that the bill of complaint filed herein should be amended so as to include among the list of States in which the American Constitutional League had members the name of the State of West Virginia, and it is hereby agreed by the United States District Attorney, representing the Appellees, that the same shall be considered as having been incorporated in the said bill for the purposes of this suit.

ALFRED D. SMITH,

Attorney for Appellant.

JOHN E. LASKEY,

United States Attorney, D. C.,

Attorney for Appellees.

[Endorsed:] No. 3432. Charles S. Fairchild, Appellant, vs. Bainbridge Colby, as Secretary of State of the United States, et al. Addition to record per stipulation of Counsel. Court of Appeals, District of Columbia. Filed Sep. 16, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

October Term, 1920.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

VS.

BAINBRIDGE COLBY, Secretary of State of the United States; A.
MITCHELL PALMER, Attorney-General of the United States.

Motion to Dismiss or Affirm.

Now come the defendants (Appellees) by John E. Laskey, Esquire, Attorney of the United States in and for the District of Columbia, and move the Court to dismiss the appeal herein or to affirm the decree below, or, in the alternative, to affirm the decree below without prejudice to the plaintiff (Appellant) to institute appropriate action or suit with reference to future acts of parties in enforcement of the Nineteenth Amendment to the Constitution of the United States.

1. By public notoriety and by the admission of the plaintiff's brief (Brief, p. 7), it appears that the Secretary of State has proclaimed the ratification of the Amendment, to wit, August 23, 1920, after the bill of complaint was dismissed, wherefore the questions presented by the bill have become moot, as to the defendant the Secretary of State, against whom the only relief sought was an injunction against the proclamation of the ratification.

(a) This branch of the motion would seem to be governed by the principle of *California v. San Pablo and Tulare R. R.*, where the Supreme Court said:

"The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

California vs. San Pablo & Tulare R. R., 149 U. S. 308, 314.

Followed in:

239 U. S. 466, 475, U. S. v. Hamburg-American Steamship Co.

242 U. S. 537, U. S. v. American Asiatic Steamship Co.

(b) The probable recurrence of the questions does not take the present case out of the above principle.

As said by the Supreme Court in *Commercial Cable Co. vs. Burleson*:

"But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason."

Commercial Cable Co. vs. Burleson, 250 U. S. 306, 362.

The anticipations referred to were that the acts complained of having been wholly unwarranted, might be renewed in future.

2. No decision is required as to the defendant The Attorney General because the sole relief prayed against him is that he be restrained from enforcing the Nineteenth Amendment (Bill, p. 22), while the only allegation of contemplated action (Bill, p. 19) is:

"If the above measure (Senate Bill 4323 providing fine and imprisonment for any person who refuses to allow women to vote) should be passed, the second mentioned defendant, A. Mitchell Palmer, as Attorney General of the United States, would be empowered and required by law to enforce the provisions of said act."

to the great injury of the complainant and his associates.

3. The appellant's brief concedes that the Secretary of State disclaims power to examine the validity of any State ratification (Brief, p. 9) and no claim is made by the bill or brief of appellant that the actual validity of the Amendment is affected by the ministerial act of the Secretary of State in proclaiming the ratification after official notice from the requisite number of States, wherefore the review sought by the appeal would be confined to the abstract question of the validity of the Amendment.

4. The granting of this motion would not defeat the purpose of appellant (Brief, p. 11) to apply for a review by the Supreme Court during its October Term.

(Signed)

JOHN E. LASKEY,
Attorney of the United States in
and for the District of Columbia,
for Defendants (Appellees).

A. D. SMITH, Esquire,
Attorney for Appellant.

SIR:

Take notice that I have this 21st day of September, 1920, submitted the foregoing motion to the Court of Appeals for its consideration on two days' notice to you.

(Signed)

JOHN E. LASKEY,
Attorney of the United States in
and for the District of Columbia.

(Statement under Rule XVI follows.)

Statement under Rule XVI, Section 2.

Charles S. Fairchild, a citizen and resident of the State of New York, for himself and persons similarly situated, members of the American Constitutional League, filed a Bill in Equity July 7, 1920, to enjoin the Secretary of State from proclaiming the ratification of the Suffrage Amendment, and prayed also that the Attorney General be enjoined from enforcing Senate Bill No. 4323, should the same become a law, which bill proposes a penalty by fine or imprisonment against any person who refuses to allow women to vote. The bill was filed and dismissed before the thirty-sixth State, Tennessee, had ratified.

The plaintiff's title to maintain the bill is stated to be that he and the class he represents are tax-payers and voters, and women suffrage would increase taxation by the increased cost of elections, and the effectiveness of his vote and that of those he represents would be diminished to the extent of the addition of the votes of women.

The validity of the suffrage amendment is challenged on the ground that the power to amend the Constitution, as originally provided in that instrument, is limited by the bill of rights contained in the first ten amendments; that under the bill of rights the minority states cannot have woman suffrage imposed upon them without their consent; that some of the ratifying legislatures were without power to ratify because chosen by the people before the amendment was proposed; that the West Virginia legislature ratified after it had previously rejected the amendment and defeated a motion to reconsider at the same session; that this was in violation of its rules; that the ratification of the West Virginia legislature was by the votes of a bare majority, although one of the members was disqualified, under the State Constitution, by change of residence, and another was wrongfully expelled and otherwise would have voted against the ratification.

The Court below dismissed the bill of complaint on motion of defendants, because it had not power to enquire beyond the Acts of the legislatures in ratifying, and questioned whether the suit was not premature, and the plaintiff without adequate title or interest to sue.

Endorsed: No. 3432. Charles S. Fairchild, Appellant, vs. Bainbridge Colby, Secretary of State of the United States; A. Mitchell Palmer, Attorney General of the United States, Appellees. Motion to dismiss or affirm. Court of Appeals, District of Columbia. Filed September 21, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY et al., Appellee.

Reply to Motion to Dismiss or Affirm.

Now comes the Appellant and for reply to motion to dismiss or affirm, says:

The questions involved in the above entitled cause are of national and vital importance and that the questions raised therein are not moot.

That it is within the power of the Judicial branch of the Government to require the Appellee, the Secretary of State, to withdraw his proclamation of ratification should it be determined that the ratification were unconstitutional, or should it be determined that the proposed so-called Nineteenth Amendment be not within the power of Congress to propose, or should it be found that it be not a proper amendment within the constitutional provisions.

That if any of these findings should be had by the Court then and in that case the proclamation would be void and of no effect.

That all of these questions are involved in the proceedings pending in this Court and these proceedings should not be dismissed without a full and complete hearing.

ALFRED D. SMITH,

Attorney for Appellant.

Endorsed: No. 3432. Charles S. Fairchild, Appellant, v. Bainbridge Colby, Appellee. Appellant's answer to motion to dismiss or affirm. Court of Appeals, District of Columbia. Filed September 24, 1920. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia. Filed Sep. 27, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

VS.

BAINBRIDGE COLBY et al., Defendants.

Brief for Appellant in Answer to Motion to Dismiss the Appeal.

First.

The motion is based upon the fact that while the suit was pending in the Court of Appeals of the District of Columbia, the defendant Colby issued a proclamation declaring the Suffrage Amendment mentioned in the Bill to have been ratified and become a part of the Constitution of the United States. This motion apparently assumes that the object of the suit is limited to the election to be held in November, 1920. This is a mistake. If the proclamation referred to is valid and the Amendment in question has become a part of the Constitution of the United States, it will apply not only to the National election to be held in November, but to all elections to be held in the United States for all time to come. No doubt it is desirable that a decision may be had before the November election, but it is far more important that the people of this country should know what has and what has not become a part of the Constitution under which they live and that election officials for all time to come should know how to regulate registration of voters and the reception of ballots.

Second.

The defendant, Colby, had full notice of the pendency of the suit.

The bill was filed July 7th, 1920. The defendants appeared and answered the rule to show cause July 13th, 1920. The decree dismissing the bill was entered July 14th, 1920, and on the same day an appeal was noted to the Court of Appeals. The rule on this subject is stated by Mr. Justice Holmes in *Wingert vs. First National Bank*, 223 U. S. 670-672.

"No doubt after the filing of a bill for an injunction, defendants proceed at their peril, even though no injunction is issued and if they go on to inflict an actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the Court by their own act."

To the same effect are,

Garden City Sand Co. v. Fire Brick Co. 260 Ill. 231,
Lewis v. North Kingstown, 16 Rhode Island, 15.

Milkman v. Ordway, 106 Mass. 232, 253, declares the general rule above stated. The Court said:

"The peculiar province of a Court of Chancery is to adapt its remedies to the circumstances of each case as developed by the trial."

Third.

In the case at bar the relief against the Secretary of State that should be granted, is a mandatory injunction requiring him to issue a proclamation rescinding his former proclamation on the subject and declaring that the so-called Nineteenth Amendment, alleged in the bill, is not and has not become a part of the Constitution of the United States.

14 Ruling Case Law, 315, Section 14:

"The power of a Court of Equity to grant a mandatory injunction is generally recognized."

In re Lennon, 166 U. S. 548, the original bill was filed to compel defendant Companies, to continue exchange of business with plaintiff—also a Railroad Company—notwithstanding a strike.

Held that Court had jurisdiction, p. 538.

"But it was clearly not beyond the power of a Court of Equity which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action where the circumstances of the case demand it."

In short, it is the duty of the Court to restore the plaintiff to all the rights which he has lost by reason of the erroneous judgment.

"Where a judgment or decree of an inferior court is reversed by a final judgment in a Court of Review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower Court and accordingly the Courts will, where justice requires it, promptly and as far as practicable, place him as nearly as may be in the same condition he stood in previously."

18 Encyc. Pl. & Pr. 872, Sec. 2.

S. P. Ex Parte Morris, 9 Wallace, 605;

Morris v. Cotton, 8 Wallace, 907;

Commonwealth v. Griest, 196 Penn. 396, 409.

There was no doubt a time when the power of the Court to issue a mandatory injunction was questioned, but as was said by Sir George Jessel, in *Smith v. Smith*, 20 Eq. 500, the power to compel a defendant to do affirmatively an act to which the plaintiff has a right, is now well established and should be exercised with no more

hesitation than the power to restrain him from doing something to the injury of the plaintiff. This is the law, even though the acts were done after the filing of the bill.

Tucker v. Howard, 128 Mass. 361;

Beadel v. Perry, 3 Eq. 465;

2 Story Eq., 14th Ed. Sec. 1181, Note 2.

The court is also referred to the Ninth Point in the principal brief.

Fourth.

The alternative relief asked by the motion made by defendants should not in any case be granted. It is of great public importance that the questions involved in this suit should be judicially considered and decided as soon as practicable. An affirmance without prejudice might and probably would delay a final decision.

Appellant is ready to argue the appeal on the merits at once, if the Court will hear us. But in any case we ask that the Court dispose of the case finally so far as this Court is concerned, and render a final decree, from which either party may appeal to the Supreme Court, which is the tribunal that must finally decide the controversy.

Fifth.

The motion should be denied.

ALFRED D. SMITH,

Attorney for Appellant.

WALDO MORSE,

EVERETT P. WHEELER,

Of Counsel.

Monday, October 4th, A. D. 1920.

No. 3432.

October Term, 1920.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY, as Secretary of State of the United States, and
A. Mitchell Palmer, as Attorney General of the United States.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and on a motion to dismiss the appeal or affirm the decree which was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme

Court in this cause be, and the same is hereby, affirmed with costs, on authority of *Widenman v. Colby*.

Per Mr. Chief Justice SMYTH,

October 4, 1920.

Tuesday, October 5, A. D. 1920.

CHARLES S. FAIRCHILD, Appellant,

VS.

BAINBRIDGE COLBY, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, submitted by Mr. Everett P. Wheeler, of counsel for the appellant. It is by the Court this day ordered that said appeal be, and the same is hereby, allowed as prayed, and the bond for costs is fixed at the sum of three hundred dollars.

(Bond on Appeal.)

Know all men by these presents, that we, Charles S. Fairchild, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Bainbridge Colby, Secretary of State & A. Mitchell Palmer, Attorney General of the United States in the full and just sum of Three hundred and no/100 dollars, to be paid to the said ———— certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of October, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Charles S. Fairchild and Bainbridge Colby, Secretary of State, and A. Mitchell Palmer, Attorney General of the United States a decree was rendered against the said Charles S. Fairchild and the said Charles S. Fairchild having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Bainbridge Colby, Secretary of State, and A. Mitchell Palmer, Attorney General of the United States, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Charles S. Fairchild shall prosecute said appeal to effect, and answer

all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES S. FAIRCHILD,

By EVERETT P. WHEELER, *Att'y.* [SEAL.]

[Seal of United States Fidelity and Guaranty Company.]

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By LOUIS L. PERKINS,
Attorney in Fact. [SEAL.]

Sealed and delivered in presence of—
ALFRED D. SMITH.

Approved by—

C. J. SMYTH,

*Chief Justice Court of Appeals of the
District of Columbia.*

[Endorsed:] No. 3432. Charles S. Fairchild, Appellant, vs. Bainbridge Colby, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States. Bond on appeal to the Supreme Court of the U. S. Court of Appeals, District of Columbia. Filed October 5, 1920. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Bainbridge Colby, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Charles S. Fairchild is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 5th day of October, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,

*Chief Justice of the Court of Appeals of the
District of Columbia.*

Service acknowledged Oct. 5, 1920.

JOHN E. LASKEY,

Counsel for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 5, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY et al., Defendants.

Assignment of Errors.

Now comes the appellant in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by this honorable court on the fourth day of October, 1920.

1. The Court of Appeals of the District of Columbia erred in affirming the decree of the Supreme Court of the District of Columbia which was made July 14th, 1920.

2. The Supreme Court of the District of Columbia erred in granting the motion made by the defendants to dismiss the bill filed in the cause.

3. The Supreme Court of the District of Columbia erred in holding that the plaintiff by his bill, discloses no interest or privity entitling him to maintain the same or obtain relief thereby.

4. The said Court erred in holding that there was no emergency calling for the issue of an injunction therein.

5. The said Court erred in holding that there was no limit to the power to amend the Constitution of the United States granted by the Fifth Article thereof.

6. The said Court erred in holding that the Ninth and Tenth Amendments to the Constitution of the United States did not limit in any way the power to amend granted in the Fifth Article thereof.

7. The said Court erred in holding that there was no limit by any implication to the power to amend granted by the Fifth Article of the said Constitution.

8. The said Court erred in holding that the pending Suffrage Amendment, mentioned in the Bill, if ratified, would not in any way violate the guarantee of the Republican form of government contained in Section 4, Article IV of the said Constitution.

9. The said Court erred in holding that the respective Constitutions of the States of Missouri and Tennessee, mentioned in said Bill, were not binding upon the respective legislatures of the said States in any action they might take upon the submission to the States of an amendment of the Constitution of the United States and that the

said legislatures could act upon the same, irrespective of any requirements or limitations imposed by the said Constitution of said States respectively.

10. The said Court erred in holding that it had no power to consider or examine the validity of any ratification by any particular legislature of an amendment proposed to the Constitution of the United States.

11. The said Court erred in holding that it had no power to consider the allegations of the Bill respecting the action of the Legislature of the State of West Virginia in respect to the ratification of said Suffrage Amendment.

12. The said Court erred in holding that it was competent for a majority of the States of the Union, as expressed in the Fifth Article of the Constitution of the United States, to impress the minority of the States forming a part of said Union, changes in the respective Constitutions, without conformity to the methods fixed by the said State Constitution for making such changes.

13. The said Court erred in holding that there was no equity in said Bill.

14. The Court of Appeals for the District of Columbia erred in not rendering a decree, that the defendant, Bainbridge Colby should issue a proclamation declaring that the proposed Amendment to the Constitution of the United States, mentioned in the Bill, has not become and is not a part of the said Constitution and that it cannot become such without the consent of all the States of the Union.

15. The said Court of Appeals for the District of Columbia, erred in not making a decree granting a permanent injunction against the defendant, the Attorney General of the United States, for an injunction restraining him from enforcing such alleged Amendment as prayed in the Bill.

Wherefore, the appellant prays that said decree of the Court of Appeals be reversed and that the Supreme Court of the United States remand the cause to the Supreme Court of the District of Columbia, with directions to enter a decree granting the mandatory injunction against the defendant, the Secretary of State, as specified in the Fourteenth Assignment of Errors, and a permanent injunction against the defendant, the Attorney General of the United States, granting a permanent injunction, as specified in the Fifteenth Assignment of Errors.

ALFRED D. SMITH,

EVERETT P. WHEELER,

Attorneys for Appellant.

(Endorsed:) No. 3432 Charles S. Fairchild, appellant, vs., Bainbridge Colby, et al. Assignment of Errors. Court of Appeals, District of Columbia. Filed Oct. 5, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3432.

CHARLES S. FAIRCHILD, Appellant,

vs.

BAINBRIDGE COLBY, as Secretary of State of the United States, and A MITCHELL PALMER, as Attorney General of the United States.

The Clerk, in preparation of the transcript on appeal to the Supreme Court of the United States, will embrace the following:

1. Record.
2. Addition to Record.
3. Motion to dismiss or affirm.
4. Answer to motion to dismiss or affirm.
5. Brief in answer to motion to dismiss or affirm.
6. Decree.
7. Appeal to Supreme Court of the United States granted and fixing amount of bond.
8. Bond on appeal to Supreme Court of the United States.
9. Citation with acceptance of service.
10. Assignment of errors.
11. This designation.

ALFRED D. SMITH.

(Endorsed) N. 3432. Charles S. Fairchild, appellant, vs. Bainbridge Colby, as Secretary of State of the United States, et al Designation of counsel as to record on appeal to Sup. Ct. U. S. Court of Appeals, District of Columbia. Filed October 5, 1920 Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type written pages numbered from 1 to 41 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, as designated by counsel in the case of Charles S. Fairchild, Appellant, vs. Bainbridge Colby, as Secretary of State of the United States, and A. Mitchell Palmer, as Attorney General of the United States, No. 3432, October Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and fix the seal of said Court of Appeals, at the City of Washington, this 5th day of October, A. D. 1920.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of
the District of Columbia.*

Endorsed on cover: File No. 27,929. District of Columbia Court of Appeals. Term No. 572. Charles S. Fairchild, appellant, vs. Bainbridge Colby, Secretary of State of the United States, and A. Mitchell Palmer, Attorney General of the United States. Filed October 6th, 1920. File No. 27,929.

(2323)

FILED

DEC 7 1921

WM. R. STANSBURY

CLERK

Supreme Court of the United States.

October Term 1921
No. 148.

CHARLES S. FAIRCHILD,

Appellant,

against

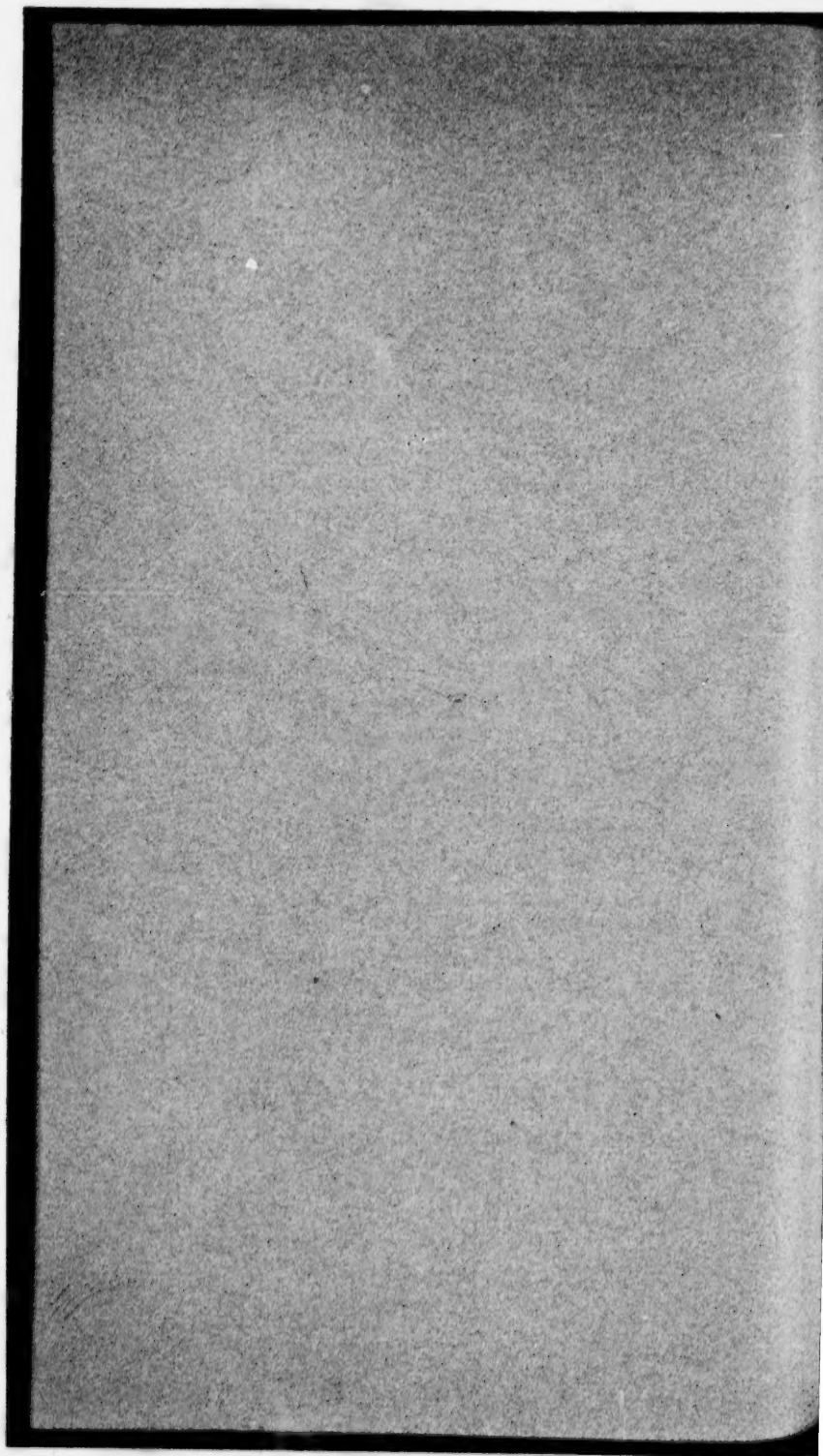
CHARLES E. HUGHES, as Secretary of State of the
United States,

and

HARRY M. DAUGHERTY, as Attorney General of the
United States.

BRIEF FOR APPELLANT.

EVERETT P. WHEELER,
WALDO G. MORSE,
Of Counsel.



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SUPREME COURT OF THE UNITED
STATES.

OCTOBER TERM, 1921.

No. 148.

CHARLES S. FAIRCHILD,

Appellant,

against

CHARLES E. HUGHES, as Secretary of State of the
United States,

and

HARRY M. DAUGHERTY, as Attorney General of the
United States.

APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District, which dismissed a bill to restrain the

defendant, The Secretary of State, from issuing a proclamation declaring that the so-called suffrage amendment has been ratified, or that it has become a part of the Constitution of the United States, and to restrain the defendant, the Attorney General, from enforcing said amendment. The bill was filed July 7, 1920.

The complainant is President of the American Constitutional League, which is composed of members, citizens of the United States and citizens of the following States: Arkansas, Maryland, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, Virginia and West Virginia. He sues on their behalf because the number of members is so great that it is impossible to make them all parties to the suit. The question is one of common or general interest to all the members. It is based upon the following fundamental propositions:

1. The so-called amendment is not an amendment at all, but would, if adopted, work a fundamental change in our Government by taking away from the States the power to regulate the suffrage for the offices of the State Governments. It is, therefore, not within the power of amendment given by Article V. It is also in violation of the 9th and 10th Amendments to the Constitution. These amendments constitute a limit to the power of amendment given by Article V.

2. The right to regulate the suffrage is an essential part of a republican form of government guaranteed by Section 4, Article IV, of the Constitution. The amendment deprives the States of this.

3. The ratification of which a certificate had been transmitted to the Secretary of State from the States of Missouri and West Virginia is illegal and void. The ratification by the State of Tennessee since the bill was filed is also illegal and void.

4. The action of the Secretary of State in certifying the ratification of said amendment is ministerial only and so declared by him. He has no power, and so declares, to investigate the validity of any particular certificate of ratification, nor the validity of the amendment itself.

5. The rights of the members of the association, as citizens and tax payers would be irretrievably injured if such proclamation should continue in force and if the Attorney General should undertake to enforce the amendment. Such action would give rise to a multiplicity of suits. There would be no remedy in damages to the complainant and to those for whom he sues.

The references in this brief are to the original pages in the Record.

The plaintiff represents citizens of nine States. They are taxpayers in their respective States and each of them with one exception has the right to exercise the elective franchise therein.

Record, Article II, p. 2.

The facts as to the settlement of the various States, of which the parties represented by plaintiff are citizens, the Declaration of Independence in 1776, the exercise by each State of sovereign powers acknowledged by Great Britain in the Treaty of Paris September 3, 1783, are alleged in Articles III to V of the Record, pages 2-3.

The Constitution of the United States took effect by the ratification of the ninth state June 21, 1788. The ratification by the people of said States was in good faith, and with full assurance that said States and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purpose of, and with only the powers enumerated in the several articles of the said Constitution, and that all other powers not delegated nor prohibited to the several States were reserved to the said several States and to the sovereign people thereof. The conventions of Massachusetts, New York, Pennsylvania and Virginia ratified on condition that further declaratory and restrictive clauses should be added.

Record, Article VII, p. 4.

It would not have been ratified but for the general understanding on the part of the people of the several States that limitations of powers of the new government should be expressed in amendments, which should state the fundamental rights of the States and of the people thereof and should operate as permanent limitations upon the powers of the general government. In accordance with this understanding and in compliance with the request of the conventions the first ten amendments were adopted in 1789.

Record, Articles VII-VIII, pp. 4-5.

The ninth and tenth amendments are as follows :

“IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Arkansas and Missouri applied for admission to the Union and were admitted on the basis and faith of these amendments.

Record, Article XI, p. 6.

This is distinctly expressed in the Constitution of Missouri.

Record, Article XII, p. 6.

At the time of the filing of the Bill, the legislatures of thirty-four States had gone through the form of ratifying the Suffrage Amendment, known as the Nineteenth, and their respective Secretaries of State transmitted a certificate of such ratification to the Secretary of State of the United States.

Record, Article XIV, p. 5.

In all the States except Delaware, the Constitution of the State provides that no amendment to such Constitution shall be valid unless the same is submitted to the electors of said States for their approval at an election regularly held and as approved by them at such election.

Record, Article XVI, p. 9.

In eleven of the States which had adopted resolutions purporting to ratify said Amendment the right of citizens to vote is restricted by their several Constitutions to citizens of the male sex and the legislatures of those States have no power

under their Constitution to amend the Constitution of the State without a vote of the people of the State approving the same. In nine of them the proposition to amend the Constitution of said States so as to give women the right to vote, was submitted to the vote of the people of said States during the six years before the filing of the Bill, and was in each case defeated.

Record, Article XVII, p. 10.

In the Legislature of West Virginia a resolution to ratify the said Amendment was voted upon March 1, 1920, and was defeated. March 3, a motion to reconsider this vote was made and was defeated. Under Rule 52 of the West Virginia Senate no measure once defeated, unless reconsidered can be again acted upon during the session. Under Rule 69 of that Senate a vote of two-thirds of the Senate is required to suspend any rule. The Constitution of the State requires a two-thirds vote to expel a member. Nevertheless on the 10th day of March, 1920, the Senate of said State by a bare majority voted to unseat and expel Senator A. R. Montgomery, who was a member of the said Senate. Thereupon the said Senate, without suspending said Rule 52, attempted again to act on the said Suffrage Amendment, and passed a resolution purporting to ratify it by a vote of 15 in favor and 14 against. Said Senator Montgomery was opposed to the said resolution, and would have voted against it had he been allowed to do so. Another section of the Constitution of West Virginia provides that any Senator who removes from the county or district for which he has been elected during his term of office, loses his seat. One of the said Senators

removed from his county and district during his term, but was, nevertheless, allowed to vote on such resolution of ratification and his vote was necessary to its passage.

Record, Article XVIII, pp. 10-11.

The Constitution of Tennessee provides as follows:

“No convention or General Assembly shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or General Assembly shall have been elected after such amendment has been submitted.”

At the time of the filing of the Bill a special session of that legislature had been called for the purpose of ratifying said Suffrage Amendment. Said legislature was elected before the pending Amendment had been proposed by Congress. Record, Article XXX, pp. 20-21. Nevertheless as this court will take judicial notice, pending this suit, a certificate that the Legislature of Tennessee had ratified the said Amendment was sent to the Secretary of State. Such ratification was invalid and was annulled by subsequent vote. The detailed facts are proved in the case of *Leser vs. Garnett*, No. 553.

Under the laws of seven of the States of which the persons represented by plaintiff are citizens, the right to exercise the elective franchise is not conferred upon citizens of the female sex. If the said amendment should be enforced, the expense of election in those States would be nearly doubled and a heavy financial burden would be imposed upon said parties.

Record, Article XIX, p. 12.

The Secretary of State of the United States declared before the Bill was filed that he had no power to examine into the validity of any acts of ratification and that upon receiving one additional certificate of ratification he would issue a proclamation declaring that said Amendment had been ratified by a sufficient number of States, and has become part of the Constitution.

Record, Article XXIII, p. 15.

As the Court will take judicial notice he did this August 26, 1920; after the appeal in this case was perfected and with full notice of it.

Assignment of Errors.

1. The Supreme Court of the District of Columbia erred in granting the motion made by defendants to dismiss the bill filed in the cause.

2. The said Court erred in holding that the plaintiff by his bill discloses no interest or privity entitling him to maintain the same or obtain relief thereby.

3. The said Court erred in holding that there was no emergency calling for the issue of an injunction therein.

4. The said Court erred in holding that there was no limit to the power to amend the Constitution of the United States granted by the fifth article thereof.

5. The said Court erred in holding that the ninth and tenth amendments to the Constitution of the United States did not limit in any way the power

to amend granted in the fifth article of the said Constitution.

6. The said Court erred in holding that there was no limit by any implication to the power to amend granted by the fifth article of the said Constitution.

7. The said Court erred in holding that the pending Suffrage Amendment mentioned in the bill, if ratified, would not in any way violate the guarantee of the Republican form of government contained in section 4, article IV, of said Constitution.

8. The said Court erred in holding that the respective Constitutions of the States of Missouri and Tennessee, mentioned in said bill, were not binding upon the respective legislatures of the said States in any action they might take upon the submission to the States of an amendment of the Constitution of the United States, and that the said legislatures could act upon the same irrespective of any requirements or limitations imposed by the said constitutions of said States respectively.

9. The said Court erred in holding that it had no power to consider or examine the validity of any ratification by any particular legislature of an amendment proposed to the Constitution of the United States.

10. The said Court erred in holding that it had no power to consider the allegations of the bill respecting the action of the Legislature of the State of West Virginia, in respect to the ratification of said suffrage amendment.

11. The said Court erred in holding that it was competent for the majority of the States of the Union, as expressed in the fifth article of the Constitution of the United States, to impress upon the minority of the States forming a part of said Union changes in their respective Constitutions without conformity to the methods fixed by the said State Constitution for making such changes.

12. The said Court erred in holding that there was no equity in said bill.

13. The Court of Appeals erred in affirming the decree and in not rendering a decree for plaintiff.

POINTS.

FIRST.

Proclamation by Secretary of State.

1. A proclamation by the Secretary of State is official evidence to the whole country that an amendment has been ratified.

2. The Secretary disclaims power to examine the validity of any State ratification. Bill Article XXIII, pp. 14, 15.

3. If there is a defect in any such ratification, it must be shown by evidence dehors the record. This can only be done in a court of equity.

4. Courts of Equity have power to enjoin a public officer from doing a ministerial act which would be valid on its face, when the invalidity of it can be shown by extrinsic evidence. This is similar to the practice of granting an injunction against

proceedings at law when there is an equitable defense.

Houston v. Ormes, 252 U. S. 469, 40 Sup. Ct. Rep. 369.

Askren v. Continental Oil Co. Ibid 355, 252 U. S. 444.

5. A court of equity has also power to grant an injunction when the act ought to be enjoined, if unlawful will work irreparable injury. The question of its lawfulness should first be determined by a judicial tribunal.

Western Union Telegraph Company v. Andrews, 216 U. S. 165.

At page 166 the Court said:

"Since the decision in the Circuit Court, this Court has decided the case of *Ex parte Young*, 209 U. S. 123, 155. In that case the previous cases in this court concerning the application of the Eleventh Amendment of the Constitution were fully considered, and it was then said by Mr. Justice Peckham, speaking for the court:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

Such an injunction granted by the District Court in North Carolina was affirmed in *Hammer v. Degenhart*, 247 U. S. 251.

6. In the case at bar the question whether or not a proposed article which deprives each State of the right to regulate the elective franchise for local officers is of fundamental importance, and can only be finally determined by this Court.

SECOND.

Motion to Dismiss.

The Motion to Dismiss is based on the ground that the question involved is merely a moot question. The general principle that the Court will not undertake to decide a moot question is not denied, but it has no application to the present case.

The Association represented by the plaintiff is composed of citizens and tax payers of the United States and of ten of the several States. They certainly have a direct interest in deciding whether or not the Secretary of State should continue to circulate as part of the official laws of the United States an alleged amendment to the Constitution, which is, in reality invalid. The printed book containing this proclamation is evidence in all courts; to rebut it in any particular case is obviously impracticable. The plaintiffs, therefore, adopted the direct course of challenging the right to issue the proclamation.

The objection is made that, pending the suit, the proclamation has already issued. This, however, does not apply to the action of the Attorney General which we seek to enjoin; in fact, his official action would not begin until after the proclamation.

But it does not apply to relief against the Secretary of State, though that would necessarily be varied from the relief first asked.

In the exercise of civil rights and in the performance of civil duties, it is essential that citizens of the United States should know what the Constitution is. The Secretary of State has no power to determine this. His power is ministerial only, as he declares and the bill alleges. Obviously this must be so, for he is not a judicial officer and has no power to examine the evidence as to the validity of particular ratifications; and yet his action is *prima facie* valid and its effect is continuous. In such cases the court will inquire whether or not it is valid, and if invalid, will so decree.

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498.

It was held that although the order under review had by its terms expired, yet the principle established by it was continuous until it was revoked or adjudged invalid; and that therefore the Court would hold the case and pass upon the original validity of the order.

The court cited with approval,

U. S. v. Trans-Missouri Freight Assn.,
166 U. S. 290, 308,

and

Boise City Co. v. Clark, et al., County Commrs., 131 Fed. 415.

In this case the Circuit Court of Appeals held that though an irrigation order by a municipal body had expired, yet the court could proceed to

pass on its validity, "partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called to act in the matter."

This rule is analogous to the decisions under the old equity maxim, *pendente lite nihil innovetur*.

Tilton v. Cofield, 93 U. S. 163. At p. 168 the Court say:

"The law is that he who intermeddles with property in litigation does it at his peril and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. * * * They (the purchasers) took the chances and must abide by the result."

S. P. Heatley v. Finster, 2 Johns. Ch. 157.

Powell v. Campbell, 20 Nevada 232.

In this case plaintiff in divorce action asked to have certain specific property set apart for her use. Held that purchaser *pendente lite* was bound by decree.

S. P. Bp. *Winchester v. Paine*, 11 Ves. 199.

2 Story Eq. sec. 908 n. 3.

1 Story Eq. secs. 536, 537.

The argument apparently assumes that the object of the suit is limited to the election to be held in November, 1920. This is a mistake. If the proclamation referred to is valid and the Amendment in question has become a part of the Constitution of the United States, it will apply not only to the

National election to be held in November, but to all elections to be held in the United States for all time to come. It is essential that the people of this country should know what has and what has not become a part of the Constitution under which they live, and that election officials for all time to come should know how to regulate registration of voters and the reception of ballots.

THIRD.

Whatever Defendants Did Pendente Lite Was Subject to the Final Decree.

The defendant, the Secretary of State, had full notice of the pendency of the suit.

The bill was filed July 7th, 1920. The defendant appeared and answered the rule to show cause July 13th, 1920. The decree dismissing the bill was entered July 14th, 1920, and on the same day an appeal was noted to the Court of Appeals. The rule on this subject is stated by Mr. Justice Holmes in *Wingert v. First National Bank*, 223 U. S. 670-672:

"No doubt after the filing of a bill for an injunction, defendants proceed at their peril, even though no injunction is issued and if they go on to inflict an actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the Court by their own act."

To the same effect are,

Garden City Sand Co. v. Fire Brick Co.,
260 Ill. 231.

Lewis v. North Kingstown, 16 Rhode
Island, 15.

Milkman v. Ordway, 106 Mass. 232, 253, declares the general rule above stated. The Court said:

“The peculiar province of a Court of Chancery is to adapt its remedies to the circumstances of each case as developed by the trial.”

FOURTH.

Limit to Amending Power.

1. There is an intrinsic limit to the power of amendment, under article V of the Constitution. It must be in harmony with the system of government created by that Constitution and not destructive of it.

Gagnon v. U. S. 193 U. S. 451.

At page 457, the Court said:

“The power to amend must not be confounded with the power to create.”

It was held that a court could not enter judgment of naturalization, *nunc pro tunc*, when there was no entry or memorandum of original judgment.

John Marshall in the Virginia Constitutional Convention said (3 Elliot's Debates, p. 234):

“The difficulty we find in amending the confederation will not be found in amending this Constitution. Any amendments, in the system before you, will not go to the radical change; a plain way is pointed out for the purpose.”

In like manner it is held that a statute authorizing amendment to a pleading does not authorize the introduction of a new cause of action.

Woodruff v. Dickie, 5 Robertson (N. Y. Superior Court) 619, 622.

Givens v. Wheeler, 6 Colo. 149, 151.

Lundbeck v. Pilnair, 78 Iowa 434, 43 N. W. 270.

2. If, therefore, it can be shown that the right of local self-government is an essential part of the Constitution, the conclusion necessarily follows that a so-called amendment destroying or essentially impairing this is invalid.

That such is the nature of our government is well settled.

Hammer v. Dagenhort, 247 U. S. 251 (1918).

A bill was filed in North Carolina to enjoin United States Attorney from enforcing penalty of U. S. Child Labor Law. Decree of permanent injunction sustained.

At p. 275, the Court said:

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution."

In interpreting the Constitution it must never be forgotten that the nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate

their purely local affairs, by such laws as seem wise to the local authority, is inherent and has never been surrendered to the general government,

Texas v. White, 7 Wallace 700.

At p. 725, the Court said:

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the articles of confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'Without the States in union, there could be no such political body as the United States.' (*Lane County v. Oregon*, 7 Wall. 76.) Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

S. P. Keith v. Clark, 97 U. S. 454, Tennessee bank notes.

In *Northern Securities Co. v. United States*, 193 U. S. 197, 348, Mr. Justice Harlan, referring to

the declarations of Chief Justice Chase in *Texas v. White*, quoted above, said:

"These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety."

Chief Justice White on behalf of the dissenting justices declared with equal positiveness:

"The powers of the Federal and State Governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate." Page 369.

South Carolina v. U. S., 199 U. S. 437.

At page 448, the Court said:

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty often times of great delicacy and difficulty."

S. P. Gibbons v. Ogden, 9 Wheat. 195.

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; *but not* to those which are completely with-

in a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

In the same case (p. 204), Chief Justice Marshall said:

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting powers must arise. Were it even otherwise the measure taken by the respective governments to execute their knowledge powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the power of the other."

S. P. *South Covington v. Kentucky*, 252
U. S. 399, 40 Sup. Ct. Rep. 378, 379.
New Orleans v. United States, 10 Peters
662.

At p. 736, the Court said:

"The State of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."

On these points our great statesmen agree.

Well did Mr. Lincoln say in his first inaugural:

"To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively, is essential for the preservation of that balance of power on which our institutions rest."

Hamilton in the New York Convention, June 21, 1788 (Elliot's Debates, vol. II, pp. 267-8):

"Were the laws of the Union to new-model the internal policy of any state; were they to alter, or abrogate at a blow, the whole of its civil and criminal institutions; were they to penetrate the recesses of domestic life, and control in all respects, the private conduct of individuals—there might be force in the objection (to the plan of the Constitution); and the same Constitution, which was happily calculated for one state, might sacrifice the welfare of another. The blow aimed at the members must give a fatal wound to the head; and the destruction of the States must be at once a political suicide. Can the National Government be guilty of this madness?"

He spoke to the same effect: *Ibid.* 355.

Oliver Wolcott in the Connecticut Convention (Elliot's Debates, vol. II, p. 202):

"The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general system."

Pierce Butler to Weedon Butler, October 8, 1787 (Ferrand's Records, vol. III, p. 103):

"The powers of the General Government are so defined as not to destroy the sovereignty of the individual States."

Pelotiah Webster, often called "the father of the Constitution," in his pamphlet entitled "The Weakness of Brutus Exposed" (Phila. 1787):

"It appears then very plain that the natural effect and tendency of the supreme power of the union is to give strength, establishment, and permanency to the internal police and jurisdiction of each of the particular States; not to melt down and destroy, but to support and confirm them all."

To the same effect is Daire; North Carolina Conv.; 4 Elliott 58.

Jefferson to William Johnson in 1823 (Ford's Writings of Jefferson, vol. VII, p. 296):

"The capital and leading object of the Constitution was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other states."

Jefferson to Madison, Feb. 8, 1786:

"With respect to everything external, we be one nation only, firmly hooked together. Internal government is what each State should keep to itself."

McCulloch *v.* Maryland, 4 Wheat 315.

At page 403, the Court said:

"No political dreamer was ever wild enough to think of breaking down the lines which separates the States, and of compounding the American people into one common mass."

4. Some State Constitutions declare the same fundamental principle.

Article 1, sec. 1 of the Constitution of Texas, adopted 1876:

"Texas is a free and independent State, subject only to the Constitution of the United States; and

the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States."

Article II, sec. 3 of the Constitution of Missouri stated in the bill (Article XII, p. 6) is to the same effect.

5. The Court and the country are in a position the converse of that of a century ago. Then it was necessary to protect the general government from the encroachments of the States. They taxed the agencies of the Federal Government as in *McCulloch v. Maryland*, 4 Wheat. 316. They taxed interstate commerce as in *Gibbons v. Ogden*, 9 Wheat. 195. They taxed foreign commerce as in *The Passenger Tax Cases*, 7 Howard 283.

The Court adopted the phrase of Daniel Webster, our greatest constitutional lawyer. "The power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316, 431. That phrase is not in the Constitution. The Court adopted it in order to preserve the life of that instrument and of the system created by it.

These decisions made us a nation. Now we are confronted by the attempt of the central government, supported by a majority of states, to break down the local self government of the States. If this succeeds we shall be no longer a federal republic. Our motto—*E pluribus unum*—will be falsified.

It is no reply that this is not completed by the pending amendment. The Bank of the United States was not taxed out of existence by the law of Maryland. Interstate commerce was not destroyed by the statute of New York. Foreign

commerce was not completely dominated by the statutes of Massachusetts and New York.

But the Court saw clearly that the right claimed, if it existed at all, might be exercised so as to accomplish all these results. It held therefore that the right claimed did not exist. The power to tax was the power to destroy.

With equal justice we now say—the power to amend by changing the State Constitutions is the power to destroy. If a majority of the States can change the qualifications for electors prescribed by the Constitution of a State against the will of the people of that State, and in a manner forbidden by the State Constitution they can in effect destroy the State altogether.

FIFTH.

Effect of Ninth and Tenth Amendments.

The ninth and tenth amendments were adopted to guard against this danger. They are fundamental and irrevocable, except by unanimous consent of all the States. They were adopted subsequent to the adoption of the Constitution. If there is anything inconsistent, these must control. But they should be construed together and so construed are harmonious.

1. The articles of the Constitution are to be interpreted according to the circumstances under which they were respectively written, and the character of the people to whom they were originally addressed.

Chief Justice Marshall thus expressed this canon in *Gibbons v. Ogden*, 9 Wheaton U. S. Rep. 1 (1824), which established the right of freedom of trade between the States of the Union:

"If from the imperfection of human language there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction" (p. 188).

South Carolina v. United States, 199 U. S. 437.

In this case, the court said, p. 450:

"To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

Passenger Tax Cases, 7 Howard 283, 428.
Opinion of Mr. Justice Wayne.

In this case, the Court said:

"That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual

recognition in it of the dissimilar institutions of the state."

S. P. Evans v. Gore, 253 U. S. 245, 259,
40 Sup. Ct. Rep. 550, 555.

Knowlton v. Moore, 178 U. S. 95, 20 Sup.
Ct. 768, 44 L. Ed. 969.

Maxwell v. Dow, 176 U. S. 581, 602.

2. When a series of enactments are under consideration they should be construed together. This fundamental rule for the construction of statutes is thus stated by this Court.

Richardson v. Harmon, 222 U. S. 96, 103.

"The legislation is in *pari materia* with the Act of 1851 and must be read in connection with that law, and so read, should be given such an effect, not incongruous with that law, so far as consistent with the terms of the latter legislation."

An illustration of the application of this rule is to be found in the decision in the Conscription Cases.

Arver v. United States, 38 S. C. Rep. 159,
245 U. S. 366.

Certain persons who had been drafted to serve in the National Army contended that the Conscription Act was in violation of the Thirteenth Amendment to the Constitution of the United States:

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

It was argued that compulsory service in the Army was "involuntary servitude." But the court construed this amendment in connection with Subdivision 12 of Section 8, Article I, which gives the Congress power—"To raise and support armies." And the court held the conscription to be authorized by the constitutional power thus granted to Congress.

SIXTH.

Effect first ten amendments.

The first ten amendments were proposed when the adoption of the Constitution was under consideration. This was ratified with the express understanding that such amendments should be adopted as limitations upon the powers of the Federal Government and as securing the right of each State to Local Self-Government.

Mr. Justice Holmes delivering the opinion of the Court in

New York Trust vs. Eisner, 41 Sup. Ct. 506-7, stated the source of authority on this subject.

"Upon this point a page of history is worth a volume of logic."

What, then, is the historic record?

Massachusetts adopted this resolution, Elliot's Debates Vol. I, p. 332.

"As it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this

Commonwealth, and more effectually guard against an undue administration of the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution."

"1. That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.' "

The Convention enjoined it upon their representatives in Congress "to exert all their influence and to use all reasonable and lawful methods to obtain a ratification of the said alterations and provisions in such manner as is provided in said Article" (Article V).

South Carolina, Ibid, p. 325.

After ratification:

"This Convention doth also declare that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them and vested in the general Government of the Union."

New Hampshire, Ibid, p. 326.

After ratification the Convention add:

"As it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration in the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced in the said Convention."

“ ‘1. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.’ ”

“And the Convention, in behalf of the people of the State, enjoin their representatives in Congress to exert all their influence and to use all reasonable and legal methods to obtain the ratification of the said alterations and provisions, in such manner as is provided in the Article” (Article V).

The ratification of *Virginia* is on page 327, *Ibid.* Vol. I. Reference is made to the debates in Vol. III pp. 656-663. It declares that it is advisable to ratify rather “than to bring the Union into danger by delay.” It nevertheless declares “that no right of any denomination can be cancelled, abridged, restrained or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President or any Department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes.” It then proceeds to recommend certain amendments, the first of which is on page 659:

“That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the Departments of the Federal Government.”

New York, Ibid., Vol. I p. 327.

The preamble to the ratification declares:

“That every power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or the Departments of the Government thereof, remains to the people of the several States or to their re-

spective State Governments to whom they may have granted the same."

After a declaration of rights in other particulars it proceeds (*Ibid.*, p. 329) :

"Under these impressions, and declaring that the rights aforesaid *cannot be abridged or violated*, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, the said delegates, in the name and in the behalf of the people of the State of New York, do by these presents assent to and ratify the said Constitution."

The Convention then, in behalf of the people of the State, enjoin upon their representatives in Congress "to exert all their influence and use all reasonable means to obtain a ratification of the following amendments."

The ratification of *Rhode Island* came after the first ten amendments were proposed. This ratification is at Vol. I, pages 334-5. In the preamble Rhode Island declares :

"III.—That the rights of the States respectively to nominate and appoint all State officers and every other power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or to the Departments of government thereof, remain to the people of the several States or their respective State governments, to which they may have granted the same."

After several other recitals the ratification proceeds, p. 335 :

"Under these impressions, and declaring that the rights aforesaid *cannot be abridged or vio-*

lated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments hereafter mentioned will receive an early and mature consideration, and conformable to the Fifth Article of the said Constitution speedily become a part thereof, we, the said delegates, in the name and in the behalf of the State of Rhode Island and Providence Plantations do by these presents assent to and ratify the said Constitution." (March 29, 1790)

Then follows a resolution enjoining the Senators and Representatives from Rhode Island to exert all their influence and use all reasonable means to obtain a ratification of the following amendments to the said Constitution (p. 336).

"1. The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States."

The preamble and resolution propose twelve amendments to the Constitution. These are printed at pages 338-9. The first two were not agreed to. The remaining ten are those which were ratified.

2. The debates in conventions show clearly that such amendments as the Ninth and Tenth were formulated in convention and agreed to, as essential parts of the Constitution before it was ratified.

Elliot's Debates, Vol. II, p. 122.

MASSACHUSETTS:

"The President of the Convention proposed amendments "in order to remove the doubts and quiet the apprehensions of gentlemen. Mr. Samuel Adams, page 125, said that States that had not

yet acted would be influenced by the proposition which Governor Hancock had submitted. The following day Mr. Adams continued, page 131, "Your Excellency's just proposition is 'that it be explicitly declared that all powers not expressly delegated to Congress are reserved to the several States to be by them exercised.' This appears to my mind to be a summary of a bill of rights which gentlemen are anxious to obtain. It removed a doubt which many have entertained respecting the matter, and gives assurance that if any law made by the Federal Government should be extended beyond the Power granted by the proposed Constitution *and inconsistent with the Constitution of this State, it would be an error, and adjudged by the Court of law to be void.*" He voted for ratification, page 278. This was adopted by Yeas 187, Noes 168, page 181.

The circular letter sent by the Massachusetts Convention to the Governors of the several States, dated July 28, 1788, is at pp. 413-14. It begins:

"Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general convention, and an invincible reluctance to separating from our sister States, could have prevailed upon a sufficient number to ratify it without stipulating previous amendments."

It urges that the earliest opportunity be taken for making amendments.

After the ratification by the PENNSYLVANIA Convention, a large meeting of citizens was held at Harrisburgh. This meeting after free discussion and mature deliberation adopted certain resolutions, printed at pp. 543-46, Vol. II. Page 543:

"We are clearly of opinion considerable amendments are essentially necessary. In full confi-

dence, however, of obtaining a revision of such exceptionable parts by general convention, and from a desire to harmonize with our fellow-citizens, we are induced to acquiesce in the organization of said Constitution."

It then goes on to urge prompt action to obtain amendments, and presents a petition to the Pennsylvania Legislature to propose some specified amendments. Among them, page 545, is the following:

"All the rights of sovereignty which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with and shall be exercised by the several States in the Union according to their respective Constitutions."

In the report of the Convention of MARYLAND it is stated that after the vote of ratification had passed, Mr. Paca brought the proposed amendments before the Convention

"declaring that he had only given his assent to the government under the firm persuasion and in full confidence that such amendments would be peaceably obtained so as to enable the people to live happy under the Government. That the people of the county he represented and that he himself, would support the government with such amendments, but without them not a man in the State, and no people, would be more firmly opposed to it than himself and those he represented."

Elliot Debates Vol. II, p. 549.

A committee was appointed to propose amendments. The first proposed by it, page 550, is as follows:

"That Congress shall exercise no power but what is expressly delegated by this Constitution."

This amendment was agreed to by the Convention, *Ibid.*, page 552. Page 554 all the members who voted for ratification

“declared that they would engage themselves under every tie of honor to support the amendments they had agreed to.”

3. Historians agree that the ratification by the States just mentioned was upon the understanding and agreement that the amendments reserving the right of each State to local self government would in substance be adopted.

Stephens, *War between the States*. Vol. I, pp. 489, 490.

Tucker, *Constitution of the United States*, Vol. I, p. 130, Vol. II, pp. 665, 667, 691.

Bancroft, *History of the Constitution*, Vol. II, p. 272.

Schouler, *History of United States*, Vol. I, p. 60.

“These amendments may be said to have completed the Constitution, in the sense that it was urged, and in effect admitted, that what they contained deserved a place in the instrument itself.”

The Cambridge Modern History, Vol. 7, Sec. 1789, p. 304.

Curtis on the Constitution. Vol. II, p. 162.

See *Robertson v. Baldwin*, 165 U. S. 275, 281.

4. These ten amendments constitute a Bill of Rights, which can only be repealed or altered by the unanimous consent of all the States. They

are here reprinted in order to bring out more distinctly their fundamental character. It would indeed be an evil day for America if it should be held that it is competent for a majority of Congress and of the State Legislatures to deprive American citizens of these fundamental rights. To set up an established church, to prohibit the free exercise of religion, to deprive an accused person who has been acquitted of the benefit of that acquittal, to deprive a citizen of life, liberty or property without due process of law, to deprive him of the right of trial by jury; all this could be done by a majority in Congress and of the State Legislatures if the proposition of the appellees that there is no limit to the power to amend should be sustained.

The President, in his address at the opening of the Washington Conference (1921) thus stated the proposition on which we rely:

"Inherent rights are of God, and the tragedies of the world originate in their attempted denial."

I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II.—A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

III.—No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

IV.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

VII.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SEVENTH.

The effect of these amendments was to limit the general power conferred by Article V.

In *Barron vs. Baltimore*, 7 Peters, 243, the Court, by Chief Justice Marshall, said:

“In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general governments not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States.”

To the same effect is:

Spier vs. Illinois, 123 U. S. 131.

Miller, Lectures on the Constitution, p. 91.

2 Watson, Constitution of the United States, p. 1528.

Public Service Commission *vs.* N. Y. C. R. R.,
193 App. Div. 615 (3 Dept.)

At page 619 the Court said:

"But like all other powers granted to Congress by the United States Constitution (Art. I, §8) the power to regulate commerce is subject to all the limitations imposed by such instrument, including the Fifth and Tenth Amendments. Congress has supreme control over the regulation of interstate and foreign commerce and with the Indian tribes, but if in the exercise of that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment and can take only on payment of just compensation."

EIGHTH.

Partial subversion fatal.

1. The fact that this proposed amendment does not subvert the whole fabric of local State Government is immaterial. It does in part and that is fatal to its validity.

Fairbank *v.* United States. 181 U. S. 283.

At p. 301, the Court said:

"In short the Court held in that case (*Monongahela Navigation v. U. S.* 148 U. S.) that Congress could not by any declaration in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

"In *Boyd v. U. S.* 116 U. S. 616, the fifth section of the act of June 22, 1874, 18 Stat. 186, which authorized a court of the United States in revenue cases, on motion of the District Attorney, to require the defendant or the claimant to produce in court his private books, invoices and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clause of those amendments, and in respect to this the court said:

" 'Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approach and silent deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon' " (p. 635).

S. P. U. S. v. Hvoslef, 237 U. S. 9;

Thames & Mersey Ins. Co. v. U. S.

Ibid. 19.

2. It will be argued that this effect to be given to the Ninth and Tenth Amendments is an implica-

tion. We reply that that which is implied is as much a part of the Constitution as that which is expressed.

Fairbank *v.* United States. 181 U. S. 283.
Approved Selliger *v.* Kentucky 211 U. S.
200.

As said by Mr. Justice Miller in *Ex parte Yar-*
brough, 110 U. S. 651, 658:

“The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of the Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel, though directed to the authority of that body to enact criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed.”

Among those matters which are implied, though not expressed is that the Nation may not in the exercise of its powers prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

In other words, the two governments, National and State, are each to exercise their power as

needed, so as not to interfere with the free and full exercise by the other of its Power.

Collector v. Day. 11 Wall. 113.

At page 127, the Court said:

"It is admitted that there is no express provision in the Constitution that prohibits the Federal Government from taxing the means and instrumentalities of the State, nor is there any prohibition of the State from taxing the means or instrumentalities of that government."

"In respect to the reserved powers that state is as sovereign and independent as the general government."

S. P. Evans v. Gore, 253 U. S. 245. 40 S. C. R. 550.

NINTH.

Civil War Amendments.

1. The right to regulate local elections for state offices and to determine the qualifications of the voters at such elections is fundamental. It is an essential part of local self-government. To deprive a State of it is to extend the Constitution to a field entirely different from any covered by it. It is not properly an amendment but a revolutionary change.

Federalist No. 51 deals with the qualifications of the electors of the House of Representatives.

"The definition of the right of suffrage is very justly regarded as a fundamental article of Republican Government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution."

"To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself."

Ed. Ford, p. 342. (In some editions this article is numbered 52.)

Ed. Dawson, p. 365.

2. If the precedent of the 13th, 14th and 15th amendments is relied upon, the answer is that they were revolutionary and were imposed upon the seceded States as a result of Civil War and as a condition of their admission to the Union. They were finally assented to by each of them and thus became by unanimous consent a part of the Constitution.

The Thirteenth Amendment was proposed February 1, 1865, and was declared to have been ratified in a proclamation by the Secretary of State, December 18, 1865. The Fourteenth Amendment was one of those growing out of the Civil War, and relates to the civil rights of citizens of the United States, excludes from Federal offices those who had served the Confederacy, and prohibits the payment of the Confederate debt. This was proposed June 16, 1866, and was conditionally declared to have been ratified in a proclamation by the Secretary of State, July 28, 1868. The ratification of this Amendment was imposed by Congress as a condition of the readmission to the Union of the seceded States. The same is true of

the Fifteenth Amendment, which was proposed February 27, 1869, and was declared to have been ratified in a proclamation by the Secretary of State, March 30, 1870.

Especial attention is drawn to the facts before mentioned as to the circumstances under which these Amendments were declared ratified, because no inference should be drawn therefrom as to the ratification or validity of amendments in ordinary times. The question as to whether or not the seceded States were entitled to readmission unconditionally was decided in the negative by the great majority of the Northern people at the polls and in Congress. What was done was really a reconstruction of the Union, and was so conceded at the time. The history of the proceedings is given in Blaine's *Twenty Years in Congress*, vol. 2, pp. 188-217; 414-421. The whole proceeding on these Amendments was equivalent to the adoption of a new Constitution, as far as negro slavery and negro suffrage were concerned.

These amendments were the offspring of the Civil War. That conflict originated in disputes about slavery. The Emancipation Proclamation was issued by virtue of the War power, and when the war was over it was fitting to remove its cause.

Stuart v. Kahn, 11 Wall, 493, 507.

In this case, the Court said:

This war "power is not limited to victories in the field and the dispersion of the insurgent forces; it carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

It is not denied that the suffrage amendment might become a part of the Constitution, if agreed to by all the States. The contention is that under the Tenth amendment no State can be deprived of the right to regulate local suffrage for state offices without its consent.

TENTH.

Prohibition Cases.

Rhode Island vs. Palmer, 253 U. S. 350

and the other Prohibition cases are relied upon to sustain the validity of the Nineteenth Amendment. But an examination of these cases in connection with

Jacob Ruppert vs. Caffey, 251 U. S. 264,

shows that the decisions in these cases were placed wholly upon the police power and the consequent authority to do anything in connection with the traffic in intoxicating liquors that the Court might deem "necessary to the peace and security of society." In the Ruppert case the Court cites

Mogler vs. Kansas, 123 U. S. 623.

The Court in this case cites with approval

The License Cases, 5 Howard, 504

and at pages 657 and 658 quotes with approval the language of Taney, C. J., page 577, of the report in Howard, McLean, J., pp. 588, 589, Woodbury, J., p. 628 and Grier, J., pp. 631 and 632.

In these cases this Court laid down distinctly the proposition that the traffic in intoxicating

liquors was subject entirely to the exercise of the police power. In the Ruppert Case the Court cited with approval,

Barbier vs. Connolly, 113 U. S. 27, 31,

in which it was held that the Fourteenth Amendment did not affect the police power of the States. Thus, for example, in the *Mogler* case, the Court held that the Legislature had power to prohibit from making beer breweries already erected in compliance with the laws of the State, and had power to thereby diminish the value of the brewery by three-fourths of such value, without making any compensation, and that it might also prohibit the sale of beer on hand at the time of the passage of the Act.

In short, these cases distinctly hold that the nature of the traffic in intoxicating liquors is such that the manufacturers and sellers have no rights that the State is bound to respect. But this rule obviously is limited to the peculiar character of that traffic and has no application to other Constitutional guarantees. In reference to these the rule is stated under the Seventh point.

It may thus be tested. Would anyone maintain for a moment that an act of the Legislature would be valid which should prohibit a baker from selling good bread which he had manufactured and had on hand, or from making bread in the future. The Legislature could, no doubt, regulate the hours of labor in the interest of the health of the employees and could compel the conditions of the work to be sanitary, but it could not be claimed that there was any right to prohibit a lawful trade like this. Certainly the right of suffrage has no connection with the police power. Whether the

right to participate in the election of representatives in the Legislature should be given to or withheld from any individual is for the sound discretion of the People in each State in framing its Constitution, in view of the conditions of the population in that State, and is in no sense an exercise of the police power.

ELEVENTH.

Republican Form of Government.

The amendment is also in conflict with the fundamental guarantee of Section 4, Article IV.

"The United States shall guarantee to each State in this Union a Republican form of Government."

1. The provision here quoted from the Constitution of the United States constitutes a covenant and likewise a limitation of power invocable against the United States in favor of each several state.

The limitation is one of two such, wherein the power to amend the constitution of the United States is cut off by the terms of that instrument.

In the one instance, a matter wholly within the scope of Federal action as defined by the constitution, is placed beyond the power of change by an express prohibition. In the other, an intrusion into the domain of state action as delimited by the constitution, is forbidden even under guise or form of an amendment, by the well understood disability to destroy or disregard its own guaranty, which limits the power of every guarantor.

A change in the representation of the states in the Senate of the United States, would be germane to the scope of the Federal government and might well be made through constitutional amendment, were it not for the express prohibition of such action, a limitation which is incapable of removal save through the consent or acquiescence of every state concerned.

An abolition of the Republican form of Government which is guaranteed to every state, cannot be permitted or accomplished by the United States or under its constitution, without the consent, at least of every state affected by such abolition and presumably by all of the states. The guarantee of a Republican form of government is a more forceful denunciation against any possibility of change in the fundamental law, than is the prohibition that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

The latter is a prohibition against an act within the ordinary range of governmental activities. The former is a solemn undertaking on the part of the United States to guarantee to each state a Republican form of Government.

The law applicable to guarantors is well understood. The warrantor of any title or immunity undertakes to protect the one guaranteed therein, as against all of the world, himself included. Not only so, but the guarantor is absolutely estopped from asserting any right or performing any act in derogation of the right vouched to the person guaranteed, so that even an after acquired title, though valid, enures to the benefit of the one guaranteed in respect to its subject.

We have, then, the right to a Republican form of Government, which was enjoyed by the States

prior to the Constitution, guaranteed to them thereunder in perpetuity, by the United States.

"The object of this provision was to secure to the people of each State the power of governing their own community, through the action of a majority according to the fundamental rules which they might prescribe for ascertaining the public will."

2 Curtis History Constitution 82.

Should the Court desire to pursue the inquiry on this point, a convenient compilation of Orders, Articles of Colonial Confederation, Plans of Organization, Conventions and other public documents dating from 1638 to 1786, may be found in the Appendix to the PRINCIPLES OF THE FEDERAL LAW by HERMAN W. CHAPIN. That appendix also contains a parallel column tabulation of such documents, correlated with provisions found both in them and in the Constitution of the United States.

Proceedings upon the ratification of the Constitution and concurrent therewith as heretofore quoted in this brief, disclose an opinion to have existed at the time of the adoption of the Constitution, to the effect that a state might perhaps withdraw from the Union of States, but even so the guaranty of a Republican form of Government was placed in the original document and always has there remained. When the Civil War and subsequent events settled the question respecting the Federal right to retain States against their will, the guarantee of a Republican form of Government sprang into a new and an added significance as to the protection which every State should enjoy within the limits of its own constitutionally defined sovereignty.

No constitutional change or amendment within the United States Government or in or concerning its own constitution can or should be permitted to override its express guarantee to every state a Republican form of Government. The United States is a corporation—a sovereign political corporation. Every state is a corporation—a sovereign political corporation. Each is sovereign within limitations and within its own sphere, but no internal change or alteration of its own constitution can change or alter the fixed contractual or guaranteed relationship between the two, without the free consent of both.

The United States is the guarantor. As well might a business corporation attempt to disengage itself from its contracts, obligations or guarantees, through an amendment of its certificate of incorporation or by-laws, as the United States of America to discharge itself from its guarantee of a Republican form of Government to every state, through an amendment of its own constitution inconsistent with its obligation, definitely assumed and heretofore unquestioned. Such an attempt implies a confusion of thought. A State as part of the Union may ratify, concur in, or consent to a constitutional amendment to any effect whatsoever, but another state, holding the guaranty of the Nation, cannot be forced against its own several will to relinquish that guaranty even though every other state should vote so to do.

2. What is a Republican form of Government?

Mr. Justice Wilson, in *Chisholm v. Georgia*, 2 Dallas 457, says:

“My short definition of such a government is that the supreme power resides in the body of the people.”

The framers of the Constitution knew the answer definitely and well. Each came from a state having a government organized under a constitution adopted by duly qualified voters dwelling therein, and enjoying a legislative and executive authority constituted in like manner. The voters in every state were such persons as held the franchise under its own constitution and laws and none others. None outside of the state ever had dreamed of interfering with that franchise subsequently to the War of the Revolution, or indeed to any great extent for appreciable periods theretofore, in many instances of colonial organization.

Principles of Federal Law, Chapin,
supra.

A Republican form of Government, meant and means a representative government such as was the government of each of the original states and in every one of those states the franchise of the free men was the cornerstone of the political structures. All the several state franchises were unlike, each to the other, saving in one thing, and that one thing was the absolute and complete control by each state of its own franchise grants, limitations and requirements, in respect to the right to vote. That one requirement of the franchise and everything built up and to be maintained through, under, and by reason thereof, was and is the Republican Form of Government which the United States of America guaranteed through its Constitution and the limitations thereof.

3. The Constitution of the United States itself recognizes and reflects the varying, but always locally controlled franchise regulations of the several states, wherein it provides:

“The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.”

Any control of the franchise from without is a destruction of that Republican Form of Government guaranteed to every state, and in the exercise of such control, the United States of America is no more a part of any state for the purposes of, or in connection with, the administration or continuation of the guaranteed form of State Republican Government, than would be the Kingdom of Great Britain, the Dominion of Canada, or some adjourning state of the Union.

For the purposes of its Republican form of Government, every state is sole, independent, self-contained and exclusive of every other state and nation, including the United States of America, its guarantor.

Suppose that by some external power minors should be enfranchised against the will of a State—or aliens resident—or aliens non-resident—or citizens of other States—would that State then enjoy the guaranteed Republican Form of Government? Suppose such franchise enforced against a State by an outside power other than the United States,—would not the Nation be bound to heed the call of any one State for help?

The District of Columbia in which this Court sits, by special constitutional provision and consequent legislation, is governed altogether by Congress. So were the conquered provinces under the Republic of Rome by the Senate thereof. It will not be contended that any form of govern-

ment such as are the forms imposed upon the District of Columbia, and the territorial domains of the United States, might be imposed upon a State of the Union, without breach of faith and a breach of the express covenant of guaranty whereby a Republican Form of Government is assured to every state.

Pro tanto, the Republican Form of Government would be destroyed in every non-consenting state, should the proposed amendment receive sanction in the courts against it, and the very heart and soul of the living principle of Republican Government would die out from the Governmental organizations of the Union of the States. If the power to tax is the power to destroy, then also indeed is the power of the ballot the power of control.

4. But some one may say that the Constitution did not guarantee such Republican form of government as each State might organize for itself, and that therefore it would be legal for the United States, by an amendment to its Constitution, to change the form of government of any State, provided that such changed form shall be Republican. Such construction would protect the State in nothing. The essence of the guarantee to preserve a Republican form of government in each state is that the people of each state shall govern themselves in their own way with respect to all matters not surrendered to the Federal government.

We must bear in mind, upon consideration of the question presented, that an extension of the suffrage to one involves a corresponding limitation of the influence of the suffrage as enjoyed by another, so that the right to extend would necessarily imply the right to limit, and, indeed, there

is no point at which the National regulation of state suffrage might be halted, if that power be held to exist for any purpose whatsoever, saving under the stress of civil war and reconstruction.

Moreover, there is no constitutional prohibition against the enforcement of varying provisions as to suffrage within the various States. Such absence of restraint is not surprising when we remember that the existence of power in the federal government to change the constitution of a State was undreamed of at the foundation of the government. As we have seen, indeed, the Constitution of the United States contemplates varying qualifications for the suffrage among the several States. A future nation then might decree white suffrage for Massachusetts, black suffrage for Alabama, red suffrage for Indiana, yellow suffrage for California, mulatto suffrage for Virginia, male suffrage for Nevada, and female suffrage for Vermont, with varying degrees of age and property qualifications. Grotesque, indeed, but constitutional according to our opponents.

Soberly it is not impossible to foresee strange restrictions upon suffrage in various states imposed by the United States under stress of political necessities.

How then should the Nation disregard or be allowed to disregard and destroy its guaranty to any several state, and in its own proper person to perpetrate an infraction against the Republican Form of Government adopted and desired by that State, the defense whereof the State has entrusted to the United States upon the faith and credit of the guarantee of the United States, disabling itself from its own protection by so doing,

and relying solely upon the limitation of National power as it should be declared by the Courts?

5. It is shown under the Eighth Point that it is not necessary, in order to determine the invalidity of a particular law, to show that this law altogether subverts the rights guaranteed. It is enough to condemn the proposal that it is an encroachment on a constitutional right.

Boyd v. United States, 116 U. S. 616.
Fairbank v. United States, 181 U. S. 283.
Stamp Tax Refund Cases, 200 U. S. 488.
U. S. v. Hyoslef, 237 U. S. 9.

TWELFTH.

Validity ratifications.

1. The right to regulate the creation and mode of action of the State Legislature is vested in each State. It was not taken from it by the Constitution originally and it is guaranteed to it by the Tenth amendment.

2. There is nothing in this contention inconsistent with the decision of this Court in the Ohio case.

Hawke v. Smith, 253 U. S. 221; 40 S. C. R. 495.

That held that the referendum section in the Ohio Constitution did not make the popular vote a part of the "legislature." It construed the latter word in its usual sense, and held it to be a

representative body. The logic of this decision supports our present argument. The legislature of a State is created by the Constitution of that State. The validity of any laws it makes are to be determined by that Constitution. Its sessions and procedure often are and always may be regulated by that Constitution.

It is claimed, however, that this Court in deciding that case changed the source of political power in the United States from the people of the United States to the Congress—turned the whole sovereignty of the people over to their creatures the State Legislatures whenever Congress so willed.

On the contrary all that *Hawke vs. Smith* decided was that a State could not create new agencies for ratification other than those provided in Article V. by making the Legislature's ratification conditional on its being approved by popular vote.

The Legislature of Ohio was to proceed as before to ratify or reject. It was attempted, however, to add a new machinery (not contemplated by Article V.) to comprise part of the act of ratification. Article V. contemplated "legislatures" restrained as they had always been by the law of their creation. It does not contemplate "legislatures plus a referendum."

3. When, therefore, the Constitution of Tennessee provides (Article XXX, bill, p. 20) that the General Assembly shall not act upon any amendment to the United States Constitution unless the "General Assembly shall have been elected after such amendment has been submitted" it provides for a proper and orderly representation of the people in that assembly upon the deci-

sion of this fundamental question. It is analogous to the submission in 1788 of the original Constitution to Conventions elected in each State after the Constitution had been proposed and submitted for their consideration.

The people of Missouri had power to declare, as they did in their Constitution (bill, Article VII, p. 6) that "the Legislature is not authorized to adopt any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State."

In like manner, the people of West Virginia had power to declare as they did in their Constitution (bill, Article XVIII, pp. 10, 11) that it should require a two-thirds vote to expel a member and that a Senator who removes from his district during his term shall thereby lose his seat. The Senate of West Virginia had the power, which all legislative bodies have, to prescribe rules for the orderly conduct of its business. In pursuance of this power, it made a rule (52 bill, p. 24) that "The question being once determined must stand as the judgment of the Senate." Then follow clauses for enforcing this rule. Nevertheless, after a resolution to ratify the proposed suffrage amendment had been defeated in the West Virginia Senate and a motion to reconsider the same had been defeated, the Senate of that State by a bare majority voted to expel one of its members, ignored the fact that another had removed from his district, and then went through the form of ratifying by a bare majority of the quorum thus illegally obtained, the suffrage amendment. Bill, Articles XVIII, XIX; pp. 10-12.

In the part of their constitutions known as the "Bill of Rights", the people of Missouri, Rhode Island, West Virginia and Texas have forbidden their Legislatures to impair their right of "local self-government" and the people of Tennessee have forbidden the members of their Legislature to record the "assent of their State" to any Federal Amendment proposed subsequent to their election.

4. When the people of all the States entered the Union they did not surrender to Congress the right to endow incompetent Legislatures with "omnipotent" power simply by submitting Federal Amendments to them for ratification.

The people did cede to the Congress the right to propose to their "legislatures", the very much restrained representative bodies which "made the laws for the people", such amendments as Legislatures were competent to ratify.

But by the alternative method provided in Article V for which there can be no other purpose, the people, in the same sentence reserved to themselves, acting directly in State Conventions (the only way they can act directly in their sovereign capacity, *McCulloch vs. Maryland*, 4 Wheaton 403) the power to ratify all Federal Amendments as to which the legislatures were not "competent."

(Note, that even the people thus acting directly are "incompetent" to deprive any State of its "equal suffrage in the Senate.")

The people thus adopted the Constitution.

It was the only way they could have adopted it. For as Madison said (5 Elliott's Debates 355):

"the Legislatures were incompetent to the proposed changes"

"it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence."

Mason also agreed with Madison (5 Ell. Deb. 352). He said:

"The legislatures have no power to ratify it. They are the mere creatures of the State Constitutions and can not be greater than their creators * * * Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment that this doctrine should be cherished as the basis of free government."

How can any one suppose that the framers when actually in the very act of following Madison's and Mason's advice to submit the Constitution to the people themselves acting directly in State Conventions, nevertheless, in the same breath, by Article V. approved the other "novel and dangerous" method and authorized it to be applied at the pleasure of Congress.

If so, the alternative provided for State Conventions was totally unnecessary.

In view of this it is legally doubtful if any of the 23 Legislatures in the male suffrage States counted as ratifying were competent to so amend the "male clauses" of their State Constitutions. It is legally certain that the Legislatures of Missouri, Rhode Island, West Virginia, Texas and Tennessee were not competent to ratify.

The people were certainly not giving to Congress in Article V the right to endow "incompetent" legislatures with unlimited powers to "un-

make" the Constitution which they were not competent to approve.

The people made the Constitution and the people alone can unmake it.

Cohens vs. Virginia, 6 Wheaton 389.

No implication can grant such power to Congress.

The discretion to "propose" to legislatures does not change the meaning of the term "legislature" or endow the body so named with new powers or abolish restraint inherent in the very nature of the political agent bearing that name.

It is true the legislatures derive from Article V their power to ratify such amendments as their people have not prohibited them from ratifying by clauses in their State Constitutions.

But when they come to act on a Congressional proposal each legislature speaks, not for people outside its State, *but for its own State and people alone*, otherwise it would record something other than "the assent of its State."

In attempting to override the will of its own people incorporated by them into their organic law it attempts to turn their refusal into an "assent."

If Congress can remove, in its discretion, by "proposing" amendments to them, the limitations which the people of a State have imposed upon their legislature then it is not the "*assent of the State*" which is recorded at all, but the unrestrained individual view of the members of its legislature perhaps elected (as 34 legislatures were here) before the proposal was made by Congress; perhaps called into special session (as 30 legislatures were here) and utterly lacking a popular mandate.

When the people of a State elect a legislature on other issues do they give it blanket authority to disfranchise them, or to dilute their votes by enfranchising others, by means of any Federal Amendment to that end, which may be *subsequently* "proposed" by Congress?

The question answers itself. In that event the people of every State hold all their political rights at the discretion of Congress and omnipotent unrestrained legislatures.

Yet that is the sole foundation upon which the asserted legality of the 19th Amendment rests.

If so it completely destroys any residuary sovereignty in the people of the States.

When on the other hand the citizen votes for members of a State Convention under the alternative plan provided by Article V newly called to act in his name upon a Federal Amendment necessarily *previously* proposed by Congress the issue is always direct and certain and the popular mandate complete.

5. The provision in the constitution of Tennessee has been quoted:

The Texas Bill of Rights declares:

"Article I. Sec. 1. Texas is a free and independent State subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the States.

Sec. 29. To guard against transgressions of the high powers herein delegated we declare that everything in this "Bill of Rights" is excepted out of the general powers of government and all laws contrary thereto or to the following provisions shall be void."

As the only act of any Texas officials which could impair the right of local self-government of the State of Texas would be the action of the legislature of the State of Texas in ratifying a Federal Amendment having that effect, such action is "excepted out of the general powers of government," that is forbidden by Sections I and 29 of the Texas Bill of Rights.

The Rhode Island Constitution (1843) says:

ARTICLE I.

(*Preamble to Bill of Rights.*)

Declaration of certain Constitutional Rights and Principles.

"In order effectively to secure the religious and *political freedom* established by our venerated ancestors, and to preserve the same for our posterity we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained and preserved and shall be of paramount obligation in all legislative, judicial and executive proceedings."

Sec. I. "In the words of the Father of his country we declare 'that the basis of our political system is the right of the people to make and alter their Constitutions of government, but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all!'"

No action of the Rhode Island Legislature is "competent" to record "an explicit and authentic act of the whole people of Rhode Island" unless Congress in defiance of the people of Rhode

Island can give it that competency, in which case it is certainly not "the free and voluntary assent of that State and her people to the 19th Amendment," involving a change in the male suffrage clause of her State Constitution.

Again the Constitution (1872) of West Virginia says, Art. I, Sec. 2:

"The government of the United States is a government of enumerated powers and all powers not delegated to it, nor prohibited to the States are reserved to the States or to the people thereof.

Among the powers so reserved to the States is the exclusive regulation of their own internal government and police and it is the high and solemn duty of the several departments of government created by this Constitution, to guard and protect the people of this State from all encroachments upon the rights so reserved."

If that is not a mandate to the Legislature of West Virginia, which is certainly one of the "several departments of government" of that State not to vote for a Federal Amendment which attacks her "internal government" by taking from her citizens in part the right to choose the voters of that State, it means nothing.

In face of that mandate to the people of West Virginia can any one contend that the action of the West Virginia Legislature in voting to ratify the 19th Amendment expressed the free and voluntary "assent of that State" to its enactment.

6. The above four states were among the "male suffrage states"; that is each of their constitutions also contained a provision limiting their suffrage to "males." These provisions were entirely consistent with the Federal Constitution.

The members of these four legislatures were all bound, by their official oaths as such, to support and defend their State Constitutions. Nevertheless a majority in each *as counted* ignored their official oaths, violated the express provision above quoted forbidding them to ratify and sought to amend by indirection the "male clauses."

We are dealing here not with the effect of the 19th Amendment if validly enacted, upon State Constitutions which it would of course supplant, but with the "competency"; the "power" of "legislatures" to validly record the "assent of their States" thereto.

The assent of a particular state must be the free and voluntary act of the people of that State however much it must conform to the method Article V has fixed.

The "legislature" which acts (however it derives its powers), is still composed of State officials elected, organized and acting in the orderly way prescribed by the Constitution of that State and necessarily subject to all the limitations prescribed therein, limiting its power to act, prescribing the place of meeting, its dual form of organization, the procedure and all its powers.

In conformity with them and not otherwise it must record the "assent or dissent of its State."

7. If Congress can remove all the State restrictions on its powers and make it omnipotent; then its members are not members of the State Legislature at all, but Federal officials acting under a Federal Power and in no sense of the word would they record the "assent of their State" to a proposed amendment. The States as such would cease to take part in amending the Federal Constitution.

There is no such political concept in this country as the people of the United States in the aggregate.

The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the States. There are but two modes of expressing their sovereign will known to the people of this country. One is by direct vote. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now, it is not a matter of opinion or theory or speculation, but an undeniable historical *fact*, that there never has been any act or expression of sovereignty in either of these modes by that imaginary community "the people of the United States in the aggregate."

Usurpations of power by the *Government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole people of the United States in the aggregate to demonstrate its existence as a corporate unit or political sovereignty.

Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the States as States.

No respectable authority has ever denied that, before the adoption of the Federal Constitution the only sovereign political community in this country was the people of each State.

When the Confederation was abandoned; when the Constitution was adopted by the people of the several states in their State Conventions; the General Government was re-organized, its structure

was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the State Governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies.

There was a new *government*, but no new “*sovereign people*” was created or constituted.

The people, in whom alone sovereignty inheres, remained just as they had been before.

Madison said in the Virginia Ratification Convention (3 Ell. Deb. 94):

“Who are parties to it? The people—but not the people *as composing one great body*, but the people *as composing thirteen sovereignties*.”

Lee of Westmoreland said (3 Ell. Deb. 180):

“If this were a consolidated government ought it not to be ratified by a majority of the people *as individuals* and not as States.”

Charles Pinckney in the South Carolina Convention said (4 Ell. Deb. 328):

“With us the sovereignty of the *Union* is in the *people*.”

It is with the power of the sovereign people of the United States to unmake *their* constitution, establishing *their* Federal Government which they themselves created, that we are now dealing. The question is whether that sovereignty has now been transferred to Congress and omnipotent State legislatures specially endowed by Congress, to the extent of depriving them, the only “people

of the United States" who ever existed or can exist, of their inherent right to determine for themselves who shall exercise their sovereignty, who shall constitute their electorate, in other words who shall govern their States and elect their Congressmen and Senators.

If their Congress and legislatures, specially endowed by Congress, determine in whole or in part the suffrage qualifications for the people (and in doing so brush aside the restrictions the "people" in their State Constitutions have placed upon them as their agents)—if these omnipotent agents holding no popular mandate can even disfranchise the people directly, or what is the same thing indirectly dilute their votes by enfranchising others; then the sovereignty of the people of the United States has become a myth.

These "servants of the people" exercise without limit the people's own sovereign power whenever Congress makes a proposal which endows them with that right.

This is the inevitable result of making a "scrap of paper" of the provisions of their State Constitutions inserted by the people of the five States of Texas, Tennessee, Missouri, Rhode Island and West Virginia to protect themselves from this very abuse of power.

This disposes of the claim that the people of the States in ratifying the Constitution ceded away all right to curb or limit the "power" of their agents the State legislatures in ratifying Federal Amendments, who strange to say (according to the claim) though clothed with omnipotent power still remain mere agents of the people of the States for recording the "assent of their States," but assert the right nevertheless to negative the expressed will of their own people.

To whom according to this startling theory could the people of the States have ceded their sovereign rights when they ratified the Constitution? Not to the mass of people inhabiting the territory embracing all the States for there was no such community in existence and they took no measures for the organization of such a community. If they had intended to do so the very style "United States", would have been a palpable misnomer, nor would treason have been defined as levying war against *them*.

Not to the Government of the Union, even if Congress which merely "proposes" to the States and the legislatures Congressionally endowed with omnipotence by the proposal, can all be construed to be part of the Federal Government for this purpose. For in the United States no sovereignty resides in Government or in its officials.

As Daniel Webster said (Congressional Debates Vol. IX, Part 1, page 565) :

"The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

In the Declaration of Independence, in the Articles of Confederation and in the Constitution of the United States the corner stone is the inherent and inalienable sovereignty of the people.

To have transferred sovereignty from the people to a Government would have been to have fought the battles of the Revolution in vain—not for the freedom and independence of the people of the States, but for a mere change of masters. Such a thought or purpose could not have been in the heads or hearts of those who moulded the Union, who sought by the compact of Union to secure and perpetuate the liberties then possessed. Those who had won at great cost the independence of the people of their respective States were deeply impressed with the value of Union, but they could never have consented to fling away the priceless pearl of the sovereignty of the people of their States for any possible benefit therefrom. And they did not.

The people made the Constitution and the people alone can unmake it.

It is therefore submitted that the limitations which the people of Texas, Tennessee, Missouri, Rhode Island and West Virginia put upon their State Legislatures in the organic law of their creation are valid and binding. That those five legislatures were “incompetent” to ratify.

8. Each of said alleged ratifications is null and void.

Haire v. Rice, 204 U. S. 294.

At page 300, the Court said:

“This means that Congress, in designating the legislature as the agency to deal with the lands, intended such a legislature as would be established by the constitution of the state. It was to a legislature whose powers were certain to be limited by the organic law, to a legislature as a parliamentary body, acting within its lawful powers, and by

parliamentary methods, and not to the collection of individuals who for the time being might happen to be members of that body, that the authority over these lands was given by the Enabling Act. **It follows therefore that in executing the authority entrusted to it by Congress, the legislature must act in subordination to the State Constitution."**

THIRTEENTH.

1. Counsel have not in this Brief argued the point made in Article 16 of the bill (pages 8-9) that the power of legislatures to ratify amendments of the Federal Constitution is subject to the referendum. We bow to the authority of *Hawke vs. Smith*. But we submit that this decision makes it all the more important that the action of each legislature, which when valid, this decision makes final, should be in accordance with the Constitution and parliamentary law of each state. Members of the legislature have only delegated authority. If this authority once delegated cannot be revoked by the people, it is specially important that it should be exercised within the limits fixed by the Constitutions of the several States which have been adopted by the people thereof.

2. Counsel also have not argued at length the point made in Article XVII (pages 9-10) that in eleven states, the legislatures of which have adopted resolutions ratifying the Suffrage amendment; "The right of citizens to vote was restricted by the several constitutions of said states to citizens of the male sex and the several constitutions of said last mentioned states conferred no power upon the legislatures of said States respectively

to amend the Constitution of said States, but require that in all cases a proposed amendment to such Constitutions must be submitted to the vote of the people of said States respectively.

This point is still maintained, but inasmuch as the ratification by the five states of Missouri, West Virginia, Rhode Island, Texas, and Tennessee is directly and plainly in violation of the Constitutions of those states, it has not been thought necessary to dwell on the implied limitations created by the Constitutions of the other states just referred to.

But the argument is applicable to them. We have shown that a prohibition may be implied. It need not be expressed (*ante*, pp. 30-32). For this reason the ratifications by Wisconsin, Ohio, Pennsylvania, New Jersey, Massachusetts, Nebraska, North Dakota, Arkansas and Maine are invalid. They are ingenious devices to evade the plain requirements of the Constitutions of these states.

To quote again from

Fairbank *v.* United States, 181 U. S. 283, 301:

"Illegitimate and unconstitutional practices get their first footing in that way, namely by silent approach and silent deviation from legal modes of procedure" (*ante*, p. 30).

Brown *v.* Maryland, 12 Wheat. 436.

At p. 439 the Court said:

"Questions of power do not depend upon the degree to which it may be exercised."

A danger to our American system which has developed in the present generation is thus stated

by President Butler of Columbia University in a recent address:

“Liberty, which once was endangered by monarchs and by ruling classes, has long since ceased to fear either of these; it is now chiefly endangered by tyrannous and fanatical minorities which seize control for a longer or shorter time of the agencies and instruments of government through ability and skill in playing upon the fears, the credulity and the selfishness of men.”

An illustration of this is to be found in the November election in the State of New York. Representatives of the American Legion lobbied through two successive Legislatures a proposition giving absolute preference in Civil Service appointments and promotions to persons who had served in any position in the Army or Navy. This would have destroyed the Civil Service system of the State of New York, yet the pressure of the lobbyists was such that it received an almost unanimous vote from the Legislature. It was defeated by the people by a majority of over 250,000.

The distinguishing feature of the American Constitution is that it deals almost invariably with general terms, which become from generation to generation applicable to new conditions. When the term Legislature is used there is no attempt at definition or limitation. The framers of the Constitution recognized that this was for the people of the several States to determine. The legislatures are their creation. For example, when the Constitution was adopted some of the States had Legislatures consisting of a single chamber only. No one would pretend that the people of those States, so far as Constitutional

amendments were concerned, had no power to change the legislative body so that it should consist of two chambers. Again, no reference is made in the Constitution to orderly proceedings in the Legislature, yet no one would contend that the necessity of these was not implied. No one could claim that if the members of the Legislature of Tennessee or West Virginia had assembled without any call from the Governor and without conforming to the orderly rules of legislation, and had undertaken to adopt a resolution of ratification, that would have been invalid. They would have been a mob not a legislature.

If then the formation of each State Legislature is subject to the control of the people of each State and the action of the legislative body is subject to orderly rules created by the Constitution of the State or by its own action, it follows that it is within the power of the people of the State to determine in what manner their agents in the Legislature shall exercise the great power of ratifying a constitutional amendment.

The argument to the contrary ignores the fundamental fact that each government in this country is a government of limited and delegated powers; the source of authority is in the people. Through their respective Constitutions the people of each State delegate to their representative Legislatures certain powers. Beyond the powers thus conferred the Legislatures cannot go.

This doctrine is fundamental; it underlies the whole fabric of the American Constitution. It cannot be supposed that the framers of that Constitution in one respect alone undertook to give absolute and unlimited power to Legislatures which were not created by the United States and

only in certain specified respects subject to that jurisdiction.

FOURTEENTH.

Plaintiff's Standing in Court.

Complainant sues on behalf of a voluntary Association composed of members from many different States. They are all citizens and taxpayers and all but one of them have the right of suffrage within their respective States. (Bill, Article II, p. 2.) These rights are of great importance and value. Under the American system every citizen has an equal right to be protected in person and property. But the right of suffrage is the right to share in the selection of those who are chosen to administer the government, according to the Constitution and laws of the country, and subject to the authority of the courts. This right is valuable and entitled to the protection of the courts.

This was stated clearly by Daniel Webster in his argument in the Dartmouth College Case.

The Works of Daniel Webster, Vol. 5, p. 481.

"It cannot be necessary to say much in refutation of the idea, that there cannot be a legal interest, or ownership, in any thing which does not yield a pecuniary profit; as if the law regarded no rights but the right of money, and of visible, tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right to be exercised at his own discretion, and it cannot be taken away from him. The exercise of this right directly and

very materially affects the public; much more so than the exercise of the privilege of a trustee of this college. Consequence of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right, or impair it. This motion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the Aylesbury case (*Ashby v. White*, 2 Lord Raymond, 938). That was an action against a returning officer for refusing the plaintiff's vote, in the election of a member of Parliament. Three of the judges of the King's Bench held, that the action could not be maintained, because, among other objections, 'it was not any matter of profit, either in *presenti*, or in *futuro*.' It would not enrich the plaintiff in *presenti*, nor would it in *futuro* go to his heirs, or answer to pay his debts. But Lord Holt and the House of Lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived."

This argument is concisely stated in report:
4 Wheat. 572. The Court sustained it.

Dartmouth College *v.* Woodward, 4
Wheat. 518.

At p. 629 Chief Justice Marshall said:

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Mr. Justice Story said, p. 699:

"The truth, however, is that all incorporeal

hereditaments, whether they be immunities, dignities, offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them in case of any injury, obstruction or disseizin of them. Whenever they are the subject of a contract or grant they are just as much within the reach of the constitution as any other grant."

And again, at p. 701:

"The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in Public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege."

Ashby v. White, 2 Ld. Raym, 938, 1 Kyd on Corp. 16.

The suit is well brought by plaintiff on behalf of the members of the association.

Equity Rule 38.

Smith v. Swormstedt, 16 Howard, 288.

FIFTEENTH.

Decision on amendments a judicial function.

The determination of the validity of ratification of Constitutional amendments is a judicial func-

tion. There is none more important in a constitutional government like ours.

McConaughy *v.* Secretary of State, 106 Minn. 392.

At p. 401, the Court said:

"An examination of the decisions shows that the Courts have almost uniformly exercised the authority to determine the validity of the proposal, submission or ratification of Constitutional Amendments." Citing cases from Arkansas, New Jersey, Ohio, Nebraska, Idaho, Indiana, Mississippi, Wisconsin, California, Montana, Pennsylvania, Maryland and North Dakota.

In this case, after concluding its examination of the authorities, the Court said:

"The recent case of *Rice v. Palmer*, 78 Ark. 422, 440, presented the identical question which we have under consideration. In reference to the contention that the Constitution intended to delegate to the Speaker of the House of Representatives the power to determine whether an amendment had been adopted and that the question was political, and not judicial, the court observed: 'This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but, with possibly a few exceptions, it is not found in the prevailing opinion.' * * *

"There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the manner required by the Constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. There is some authority for the view that *when the Constitution itself creates a special*

tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the Constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is true when it clearly appears that such was the intention of the people when they adopted the Constitution. The right to provide a special tribunal is not open to question; but it is very certain that the people of Minnesota have not done so."

SIXTEENTH.

Relief now asked.

In the case at bar the relief against the Secretary of State that should be granted is a mandatory injunction requiring him to issue a proclamation rescinding his former proclamation on the subject and declaring that the so-called Nineteenth Amendment, alleged in the bill, is not and has not become a part of the Constitution of the United States.

14 Ruling Case Law, 315, Section 14:

"The power of a Court of Equity to grant a mandatory injunction is generally recognized."

In re Lennon, 166 U. S. 548, the original bill was filed to compel defendant companies to continue exchange of business with plaintiff—also a railroad Company—notwithstanding a strike.

Held that Court had jurisdiction, p. 556:

"But it was clearly not beyond the power of a Court of Equity which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action where the circumstances of the case demand it."

In short, it is the duty of the Court to restore the plaintiff to all the rights which he has lost by reason of the erroneous judgment.

"Where a judgment or decree of an inferior court is reversed by a final judgment in a Court of Review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower Court and accordingly the Courts will, where justice requires it, promptly and as far as practicable, place him as nearly as may be in the same condition he stood in previously."

18 Encyc. Pl. & Pr. 872, Sec. 2.

S. P. *Ex Parte Morris*, 9 Wallace, 605.

Morris v. Cotton, 8 Wallace, 907.

Commonwealth v. Griest, 196 Penn. 396, 409.

There was no doubt a time when the power of the Court to issue a mandatory injunction was questioned, but as was said by Sir George Jessel, in *Smith v. Smith*, 20 Eq. 500, the power to compel a defendant to do affirmatively an act to which the plaintiff has a right, is now well established and should be exercised with no more hesitation than the power to restrain him from doing something to the injury to the plaintiff. This is the law,

even though the acts were done after the filing of the bill.

Tucker v. Howard, 128 Mass. 361.

Beadel v. Perry, 3 Eq. 465.

2 Story Eq., 14th Ed. Sec. 1181, Note 2.

SEVENTEENTH.

The Court of Appeals affirmed the decree "On the authority of *Widenman vs. Colby*," a decision of its own, 265 Fed. 998.

The authorities cited in the opinion in that case have no application to this. They are all decisions in proceedings for mandamus, which that case was and this is not. But even in mandamus the Supreme Court of Pennsylvania held

Commonwealth vs. Griest, 196 Pennsylvania 396, 409,

that where owing to the delay incident to litigation the election respecting which the mandamus was first prayed for had been had, the Court would retain the proceeding and grant a mandamus applicable to the next election. It should be noted also that that suit was brought by a citizen and a taxpayer on precisely the same grounds as those on which the present suit is brought; that is to say, that his rights as a citizen and taxpayer would be affected by the constitutional amendment, the validity of which was in question, and which the relator there asked to have submitted to the vote of the people.

The decision in the *Widenman* case was also based upon the proposition that a proclamation

by the Secretary of State declaring the ratification of a Federal amendment was only a ministerial act. "He (the Secretary of State) was not required or authorized to investigate and determine whether or not the notices stated the truth. * * * * Moreover even if the proclamation was cancelled by order of this Court, it would not affect the validity of the amendment. Its validity does not depend in any wise upon the proclamation."

The fallacy of this argument consists in ignoring the plain fact that the proclamation is *prima facie* evidence of the validity of the amendment; that all citizens are bound to take notice of it and that many are acting upon the assumption that it is valid. In this consists the equity of the plaintiff's bill. The case is similar to that of a negotiable instrument fraudulently put in circulation. On its face it is valid and the maker has an equity to restrain its negotiation. Here the proclamation is good on its face and citizens affected by it have an equity to restrain its enforcement.

EIGHTEENTH.

Counsel are well aware of the impression which has been assiduously fostered by the advocates of the amendment; that it has been adopted by general consent and that popular sentiment would not justify the action of a Court in declaring it invalid. This impression is contrary to the truth.

The bill alleges that in eight States, the legislatures of which have passed resolutions ratifying the amendment, and in West Virginia, the action

of whose legislature is in doubt, "A proposition to amend the Constitution of said states respectively so as to give to women the right to vote was submitted to the vote of the people of said States respectively at divers times during the six years last past and was in each case defeated by the vote of the people of said States respectively." (Article XVII, Record, p. 10.)

The Court is also reminded that its decision in *McCulloch vs. Maryland*, 4 Wheat. 315, was received with popular disfavor; was attacked by President Jackson, who refused to be bound by it and who vetoed the bill extending the charter of the Bank of the United States upon the ground that Congress had no constitutional power to charter a National Bank.

4 Beveridge Life of Marshall, 309-317.

The country suffered for want of such a system from 1837 to 1862. Then by universal consent the power was again exercised and the National Banking System came into being and has continued ever since. It now is regulated and made more efficient by the Federal Reserve System. Every banknote issued by a Federal Reserve Bank is a witness to the authority of this Court and to the final popular submission to its decisions. Political leaders come and go; party passion flows and ebbs, but this Court remains what it always has been—the guardian and interpreter of the system of government established by our fathers. It is just as important now to protect the right of the states to local self-government, as it was a century ago to vindicate the authority of the federal government against the encroachment by the states.

We are proud of popular government. We have frequent elections. That is a part of our system.

The one balance wheel in that system is the authority of the courts to enforce in time of excitement and popular enthusiasm the fundamental rules which were laid down in times of calmness and deliberation.

This is well stated by Mr. Justice Ramsey of the Supreme Court of Oklahoma, in

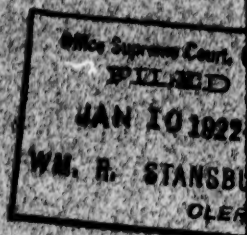
Chicago, R. I. & P. Ry. Co. vs. Taylor,
192 Pacific Reporter, 349, 356.

"In monarchies constitutions are made primarily to protect the subject from the tyranny and depotism of the crown. In democracies constitutions are made for minorities and not majorities; they are made to protect the minority from the avarice, greed, tyranny and depotism of the majority. That majority can protect itself." * * * "We trust the Constitution has not yet become a shuttlecock of public opinion, and that the despotic doctrine that 'might is right' has not and will not displace in this nation government within constitutional limitations. The police power has expanded during recent years into dangerous proportions, and it behooves us not to forget that 'eternal vigilance is the price of liberty'."

NINETEENTH.

The decree should be reversed with directions to grant a permanent injunction as prayed for against the Attorney General and a mandatory injunction directing the Secretary of State to issue a proclamation that the Amendment in question is not a part of the Constitution.

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Of Counsel for Appellant.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1921.

No. 148.

CHARLES S. FAIRCHILD, APPELLANT,

vs.

CHARLES E. HUGHES, SECRETARY OF STATE OF THE
UNITED STATES, ET AL.

SUPPLEMENTAL BRIEF FOR APPELLANT.

WALDO G. MORSE,
Counsel for Appellant.

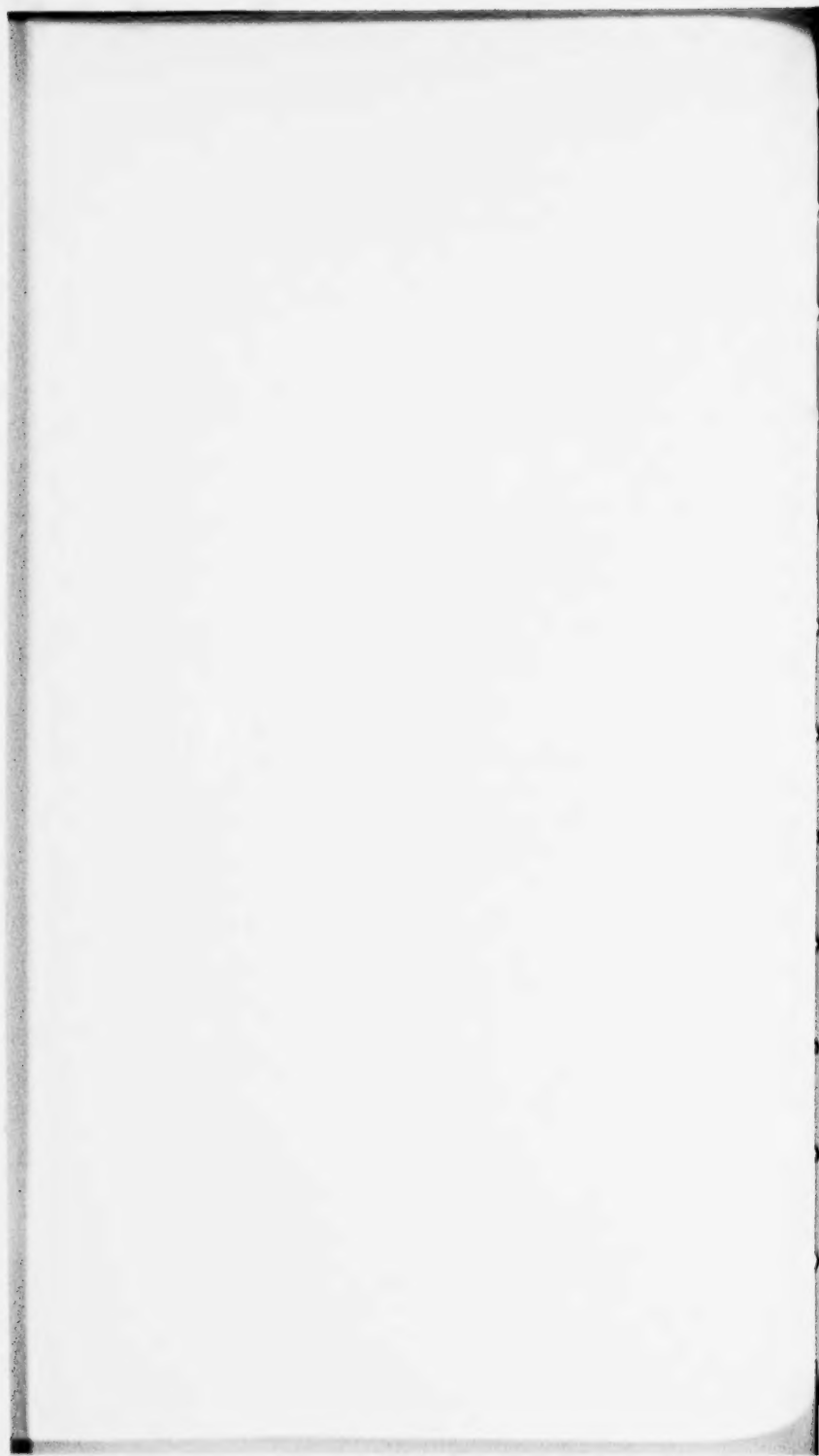
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IN THE
Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

against

CHARLES E. HUGHES, as Secretary
of State of the United States,

and

HARRY M. DAUGHERTY, as Attor-
ney-General of the United
States,

Appellees.

October Term,
1921.
No. 148.

SUPPLEMENTAL BRIEF.

The indulgence of the Court is prayed that a brief, supplemental to that already filed by Appellant, may be submitted as regards the subject matter presented in the Eleventh point thereof.

The point in question is found at page 46 of the brief, and is as follows:

“ELEVENTH.

“REPUBLICAN FORM OF GOVERNMENT.

“The amendment is also in conflict with the
“fundamental guarantee of Section 4, Article
“IV.

“The United States shall guarantee to
each State in this Union a Republican form
of Government.”

So far as counsel are able to determine, the question here presented has never been raised in any case before this Court. The paragraph quoted from the Constitution of the United States is deemed to be an express contract of guarantee which raises an express obligation that the guarantor will not do or suffer anything, in derogation of the right guaranteed.

Also the guarantee operates as a contract, by way of estoppel against any act or claim which may be made by any claimant under the guarantor, in contravention of that obligation as such. In presenting this supplemental brief, attention is called to the summary of the positions assumed by the Appellant and the Appellees respectively, in the National Prohibition cases, 253 U. S. 350.

The Appellants there contended in substance that:

"2. Article V of the Constitution of the United States does not authorize an amendment which directly, or in principle tends to impair or destroy the reserved police, or governmental power of the several States and their right to local self government."

The Appellees contended, claiming on the part of the Government substantially as follows:

"1. The first four contentions (of appellants) present questions which are committed by the Constitution to the Political branch of the Government for determination and are not justiceable questions."

It will be noted, that the argument so presented fails to apply with any effect whatsoever, to the disregard by one party of an obligation assumed by it and to be performed in favor of another.

Appellees also contended on behalf of the Government as follows:

"3. Article V provides the means by which powers which had previously been reserved to the States or the people thereof may be conferred upon the Federal Government, and confides to the proposing and ratifying bodies named therein the power to determine the nature and wisdom of and the method for adopting any amendment to the Constitution, except as in said article otherwise provided."

It will be observed by the Court, that the contention of the Government in the cases above quoted, might well be adopted by the Appellant in the present case, as the basis and ground of his own contention.

There are other considerations, however, which are presented in the present argument and which may now be summarized.

The law of bi-lateral contracts is involved in this case.

The law of contracts is involved in and lies at the base of the argument invoking the above quoted guarantee, wholly aside and apart from all questions of constitutional law or interpretation.

Unlike constitutional law, the question now considered is not one of express contract and several intention, as to mutual relationships definitely expressed and agreed; for it involves one of the three subjects expressly reserved by the Constitution it-

self from such consideration and control under the amending power.

To be sure the entire document, whereof the reservation forms a part, may be considered, for the resolution of difficulties in construction or interpretation, should such exist, but the guaranty amounts to an express reservation, of greater effect than any implied grant;—in effect equal to any express grant and perchance of import superior to and of more dignity than any other provision in the constitution,—otherwise contained.

It is last of all in the regular enumeration of powers, duties and reservations contained in the main body of the Constitution, and immediately precedes Article V, wherein is embodied the right of amendment.

This position indicates that it was no after thought, but a part of the generally and fully had and conceded understanding among all concerned at the time of the drafting of the Constitution, in which respects it differs from the reservations contained in Article V, being of the superior dignity.

It is a reservation limiting all that has gone before and all that comes after,—which latter is only an usual power of amendment, with limitations, assigned to the final place by general consent of mankind as they are accustomed to draft instruments in writing.

It is also a condition subsequent, a continued breach whereof would justify a rescission of the entire agreement and a return to the *status quo ante*.

The question raised is unlike any under the ordinary law of contracts.

There was and is no law or policy invokable above or beyond the terms of the contract itself. There was and is no rule of positive law or public policy, to control, limit or vary the meaning of the agreement in question.

To guide in a determination as between such mighty forces, which shall illucidate the meaning of the solemnly adopted contract, no precedents exist, saving such as may have arisen, each from a construction of the instrument itself.

It is unlike the law of contracts furthermore, in the nature of the tribunal established for the interpretation of the agreement in question. Considered in relationship to constitutional questions,—those of a nature arising within the union or such as affect private persons as among themselves,—the Court is a true judicial tribunal and the force of its decisions has always effected their own recognition either at once or ultimately, saving as regards one subject hereafter to be considered in some detail. In its relationship to the questions presented under the contract of guarantee above quoted, this court stands as an arbitrator, selected by one of the parties to the contract pursuant to a pre-existing consent on the part of the other.

The words "arising under this Constitution," as conferring jurisdiction, cover everything constituent in the Government, and undoubtedly confer upon the Court, the power of determination and control over the Departments and agencies of the Government in their relationships to all matters and things whatsoever, including contracts, agreements, modifications and amendments

of law and of the Constitution, where they affect the United States together with any other sovereignty or persons acting in the capacity of citizens of such other sovereignty whatsoever.

An intention to include jurisdiction over such other sovereignty, however, is doubtful, when a claim *in contractu* has been made under a constitutional reservation, expressly excepting a given power from the category of those granted to the Federal Government or within its jurisdiction through any possible power to amend its own constitution.

A determination regarding such powers as may be exercised by the United States, as in the Constitution expressed or implied, may be adjudicated as against the States. This Court has so held. A determination as against a State, which shall pass upon the validity of and hold void, an express reservation excluding the United States from all jurisdiction, as in a contract between that State as a separate legal entity on the one part and the Federal Government on the other, can hardly be considered as "arising under this Constitution," when the reservation was inserted therein as a direct limitation of the Federal right to exercise the prohibited power or authority as against that of the State in any manner whatsoever.

Such considerations have a direct bearing upon the right of this Court to hear and determine the questions before it. As involving "The Judicial Power of the United States," supreme and unfettered, the conscience to which has been entrusted the ultimate rightness of all acts and every proceeding of the Federal Government and of all its agencies, this Court, the one supreme embodiment of "The Judicial Power of the United States,"

may well determine the cases before it as concerning all Federal agencies.

It is to that conscience which a citizen may appeal irrespective of all matters of technical requirement. The judicial power extends moreover "to controversies to which the United States shall be a party", the jurisdiction in such respect going far beyond that previously granted over "Cases".

If the Court shall be disposed to consider whether a change in the constituent organization of one party to a bi-lateral contract, can destroy the obligation theretofore existing in favor of the other, we will now advert to the question of jurisdiction, submitting certain considerations in that regard.

No attempt will here be made to add anything to the briefs presented in the National Prohibition cases and in this case, with respect to the subject of jurisdiction generally.

Should the point be raised, however, that the guarantee above referred to, runs expressly to the several states constituting the union and may be invoked only by those States, we would ask the Court that it consider the scope and effect of its own position as a part of the integral organization of the Government of the United States, and determine whether or not Article III, Section I of the Constitution construed in conjunction with the entire instrument, places within the power of the Court, jurisdiction to pass upon a question such as that now called to its attention and presented.

Section II, of the same article is also noted,—
 "The Judicial Power shall extend to * * * controversies to which the United States shall be a party".

The jurisdiction given in the earlier part of the section, seems much broadened by the employment of the word controversy, as the United States well may be party to a controversy, wherein no case is pending in any court, such indeed being the position of the United States under the alleged amendment here in question; provided the Court should hold that the Appellants in the present instance, have no standing to enforce their claims in this Court, as a case, for the reason that no party other than one of those guaranteed in its Republican form of Government, may invoke the guarantee as against the guarantor.

Should the opinions of the Judges in this Court and their conclusions with respect to jurisdiction, be such that the main argument under the present point now about to be presented, may not be considered, it is deemed that such principal question will be duly raised in proper time, by those who may be entitled without question to claim a hearing before this Tribunal.

Regarding the construction of the guarantee to each of the States, of a Republican form of Government.

Were the question now presented, to have been considered prior to the decision of the National Prohibition cases, it is deemed that no further argument would have been made, saving by way of reference to decisions under the 13th, 14th and 15th amendments of the Constitution.

As to all such prior decisions, it will be noted that Appellant does not consider himself bound

by any decision rendered in this Court, either in respect of the particular argument presented under the above point, or in regard to any other matter, the questions here involved and arguments presented being essentially different in all respect, from such as heretofore have been heard or determined.

With respect to the decision in the National Prohibition cases, it may be sufficient to refer to the briefs therein as summarized earlier in the present argument and as filed at length in the records of this Court.

In no one of the cases discussed in those briefs arises any question whatever, respecting the right of the United States, through amendment of its Constitution or otherwise, to disregard the guarantee to every State, of a Republican form of Government. That question now and for the first time is definitely presented for the consideration of this Court, and in respect thereto, it may be noted that nowhere in the record or in the opinion or in the briefs filed in the National Prohibition cases, is used the phrase "Republican Form of Government" as bearing upon the questions therein presented, argued and determined.

In the present case, on the contrary, the limitation imposed by that guaranty, is expressly and directly contended to be one which limits power of amendment and may not be overridden, overlooked or disregarded by the United States or any power or authority thereof or acting thereunder, except upon the consent and concurrence of each and every state of this Union.

Not only is every State interested in its own Republican form of Government, but also is it concerned in the Republican form of Government which shall be enjoyed, exercised and carried on

by and in every other State, for the reason that the Union as a whole, can exist only as a Union of such States.

In the present suit, it is respectfully submitted that the 19th amendment has become and can become, no part of the law of the land, being in direct contravention of the supreme law of the land, expressly placed by the Constitution, beyond the power of Amendment.

Respecting the XVIII, XIV and XI Amendments.

It will be contended no doubt, that the 13th, 14th and 15th amendments furnish a precedent for the amendment now sought to be sustained by the Government.

The 13th, 14th and 15th amendments in the first place, were varient from, dissimilar to, and altogether unlike, the one now before the Court.

In the first place, those amendments taken altogether or singularly, did not in any form or to any extent, whatsoever confer or undertake to confer, the right of suffrage upon any individual, community or class of persons whatsoever.

Upon this proposition, it may be sufficient to cite a few cases as follows:

United States *vs.* Reese, *et al.*, 92 U. S. 214, in which Mr. Chief Justice Waite expressly so declares.

Also the case of United States *vs.* Cruikshak, *et al.*, 92 U. S. 542, p. 555, in which it is held that in the case of Minor *vs.* Hapersett, 21 Wall. 178, the Court decided that the United States has no

voters of its own creation, in the States, and wherein Mr. Chief Justice Waite reaffirms the decision last above cited.

Further the subject matter of those amendments is entirely distinct and dissimilar from the subject matter of the present amendment.

The institution of slavery, destruction whereof as a war measure became an occasion for the amendments then in question, was a peculiar institution under the Constitution of the United States. Before determining the scope and effect of decisions sustaining those amendments, this court and those who seek an understanding, should not forbear to read the earlier decisions which disclose the conditions so arising.

In the Dred Scott case, 19 Howard 393, constitutional provisions regarding negro slaves are discussed and the institution in question commented upon at length.

The right to import slaves is discussed at page 411.

General naturalization laws will be found considered on page 417.

The definition of free inhabitants is noted on page 418.

Congressional laws as to negroes are considered upon pages 419, 420 and 421.

That States absolutely control their own franchise and may confer the same on those not citizens, is noted at page 422.

And the possibility of the amendment of the Constitution as to slaves is mentioned at page 426.

The above notations are from the opinion of Chief Justice Taney, with Justices Nelson, Geier, Daniell, Campbell, Catron concurring, while Justices McLean and Curtis dissent with opinions.

Another case discussing the institution of slavery is *Prigg vs. The Commonwealth of Pennsylvania*, 16 Pet. 539 At pages 610-611:

“By the Court:

“Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fully secure and attain the ends proposed,”

and on page 611:

“It cannot be doubted that it (the right to recover slaves) constituted a fundamental article, without the adoption of which the Union could not have been formed.”

Similar words occur in the opinion of Mr. Justice Story who also sets forth at page 623:

“Before the adoption of the constitution, no state had any power whatever over the subject (negro slavery), except within its own territorial limits, and could not bind the sovereignty or the legislation of other states.”

Again at page 642 the learned Judge Wayne writes:

“Is it not more reasonable to infer, as the states were forming a government for themselves, to the extent of the powers conceded in the Constitution, to which legislative power was given to make all laws necessary and proper to carry into execution all powers vested in it—that they meant that the right for which some of the states stipulated, and to which all acceded, should from the peculiar nature of the property in which only some

of the states were interested—be carried into execution by that Department of the general government in which they were all to be represented the Congress of the United States,”

and at page 645 :

“The framers of the Constitution did not act upon such narrow grounds. They were engaged in framing a government for all of the States; by concessions of sovereign rights from all, without impairing the actual sovereignty of any one, except within the sphere of what was conceded.”

Such then was the peculiar institution of slavery involved in Amendments 13th, 14th and 15th as may well be noted at the present time.

No less is it true of the guarantee to each of the States, of a Republican form of Government, than was it true in respect to the matters then before the Court, that the rights and powers reserved to the States, then by the general provisions of the Constitution,—now and in the present case by an express contract and agreement on the part of the United States, made with and to each of the several states;—that, in the absence of such understandings and agreements, there implied and here expressed, an absolute *impassé* would have arisen, and the Constitution would have proven a dead letter. The United States as attempted to be organized would have come to naught and utterly failed to exist.

In the Pennsylvania case the learned Justice noted that fifty years had elapsed since the raising of the first question in the Supreme Court of the United States, at the time of the decision of Prigg case cited *supra*, and proceeded to predict that the decision of the Supreme Court then; rendered

impossible any further question or controversy which might have existed in the absence of such decision.

Later in this brief is discussed somewhat of the law of contracts and the law of promotion as applicable to the status of the several States under the Constitution of the United States, but here and now we will pass on to the immediate question in hand.

Further citations, respecting the 13th, 14th and 15th amendments may be indicated as *Hodges vs. U. S.* 203 U. S. 1, and the *Slaughter House* cases, 16 Wall. 36, in which latter case, the Court by Mr. Justice Miller expressly sets forth at page 67, the importance of the questions there considered and the effect of the 13th, 14th and 15th amendments thereupon.

Without further comment or citation and for the purpose of the consideration of the provisions of the Constitution concerning African slavery, we may turn to the instrument itself.

The Constitution of the United States, Article I, Section 2, as originally adopted, provided as follows:

“Representatives and direct Taxes shall be apportioned, etc., according to their respective Numbers, etc., determined by adding to the whole Number of free Persons, including, etc., and excluding Indians not taxed, three-fifths of all other Persons.”

Here then is a recognition of African slaves who give to their respective states representation to the extent of three-fifths of their members in each State.

Upon the emancipation of the slaves, as a war measure, the question was presented as to what

should be done with that three-fifths representation, which had existed since the establishment of the Union, under the concurrence of all of the States.

Previously that three-fifths of the population had been represented by the votes of the masters of the slaves. Should such representation be altogether destroyed or should it be continued under the votes of the masters or should it be made a full representation?

The last proposal was adopted for the reasons fully set forth in case already cited.

Section 9 of the same article of the Constitution provides:

“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

Article IV, Section 2, of the Constitution, provides:

“No person held to Service or Labor, etc., escaping, etc., shall be discharged.”

Again indicating the special and peculiar position of the institution of slavery and the status of the slaves.

Once more in article V of the Constitution, appears a further reference to the peculiar institution of slavery as follows:

“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the

Ninth Section of the first Article, and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Thereafter and following the adoption of the Bill of Rights as part of the Constitution, and following the freeing of the slaves, came amendments 13th, 14th and 15th, dealing with the peculiar institution in question, following the emancipation of the slaves as an act of War, construed by this Court as conferring no franchise or right to vote upon any person whatsoever, and it is submitted that this court cannot follow the decisions holding such amendments to have been valid, without a most material extension of the scope and effect of those decisions, covering new and altogether different grounds and deciding that rights, privileges and franchises heretofore and up to the present moment, held to be wholly and exclusively within the jurisdiction and powers of the several States, now may be taken away from the States and vested in the United States.

Such considerations then, disclose the complete failure of all analogy between the earlier amendment of the Constitution and the amendment now before the Court.

Never has the status of the family as a political organization and as the basis for political power, failed in recognition, prior to times well within the memory of the present generation. Uniformly and without exception, in Colonial times, after the Revolution, upon the establishment of the Constitution and through the Civil War, will be found a complete absence of legislative or other attempt to prevent the universal and consistent representation of the Community in its defense and political administration, by the adult males of the Communities respectively.

Neither in the Constitution nor in the Laws of the United States or of any State, will there be found a hint of such peculiar reservations, restrictions and bases of jurisdiction over women, as those which we have found and examined, referring to African slavery.

There is nothing upon which the law making power or the Court can lay its hand, as affording any ground for a holding that any person, State or convention considered or contemplated, the possibility of an abandonment of a male suffrage, representing families as the constituent organizations upon which the State had been, was and should be established and perpetuated. The distinction seems ample, complete and conclusive.

The Constitution of the United States, in its implied reservations and more particularly in its express limitations of power, was established as and yet remains a barrier against innovations such as the one embraced in the 19th amendment, sought to be forced upon any State.

A quotation from Andrews American Law (Edition 1908, Vol. 1, at page 155) may be indulged:

“That any attempt by the whole people, or by any majority of them, or any portion of them, to accomplish the same in any other mode, would be legally nugatory, unconstitutional and revolutionary, and that the people have expressly guarded themselves against the will of majorities and have rendered themselves incapable of destroying the autonomy of the states, by guaranteeing to each a republican form of government”.

The 19th Amendment is Unlike the 15th.

In its operation, the 15th amendment confers the electoral franchise upon no one. This Court has so held.

In its operation the 19th Amendment has conferred the electoral franchise upon millions. It was intended so to do.

The difference in operation arises from the variant character of the subject matter upon which the Amendments were to operate.

In effect, and broadly speaking, free men had always enjoyed the franchise under all State Laws.

When the chattel slaves were confiscated as contraband of War and then guaranteed freedom, both as acts of War, the freedom so granted by the United States to those who had been its own, was sought to be protected by means of the 15th Amendment.

At that time the former slaves already possessed the franchise by the force of their freedom, in which the Amendment did no more than guarantee them.

The 15th Amendment mentioned neither man nor woman, yet no single woman was by it enfranchised for the simple reason that it enfranchised no one.

No more can the 19th Amendment enfranchise anyone. In terms, it might be held to prohibit the disfranchisement of women in the State of Colorado, but such was not its intention.

The 19th Amendment on the contrary, was intended to accomplish something entirely novel in our history and to grant the franchise by its own force directly to woman who theretofore had enjoyed no such rights under any State Law.

It has caused that revolutionary change and should be declared unconstitutional by this Court.

It is not yet too late to save the faith and credit of the United States.

The Improper Contentions of Appellees.

The position of Appellees is intensely improper.

Continuously since the time of Lord Holt, the elective franchise has been a property right, enjoying the recognition and protection of the law, throughout England, the United States and all countries wherein the common law has prevailed.

That franchise has been enjoyed by these States and their citizens undisputedly and under claim of absolute right, during the entire period of life of the Republic until now, when Appellees argue that it has been taken away by a recently devised *vis major*, in the form of a new brand of constitutional law.

During the days of Marshall, Story, Taney, Waite and their contemporaries, such contentions would have proved futile.

Among the members of the Constitutional Convention, the proposition would have aroused alarm and derision as unthinkable to some and portentously terrible to others.

When then, where and how, did the determination that the United States should acquire this franchise and right against the will of certain States arise?

It can not be that subtle and covenous minds embodied the power to appropriate, in the text of the Constitution itself, for no such hint is found in all of the histories of the debates and times from which the Constitution sprang.

The States were not tricked into an unwitting cession of inherent rights, through any subtlety of language deftly defrauding the signatories to the Constitution. The Constitution by its terms did actually protect the States in the reservations of rights, stipulated on the face of the document.

All of the early, middle and historically late determinations of this Court, justify this postulate. The Appellees then cannot be in the position of receiving rights of property covenantously acquired by others.

But were defects discovered in the Constitution, by reason whereof, it should appear that the States unwittingly had exposed themselves to a deprivation of their property and rights, yet the Appellees claiming under the United States would be estopped from availing themselves of such rights in fraud of the rights of the States which had relied upon and acted upon the representation of the promoters of the United States, to the effect that no such defect did in fact exist.

The Law of Promotion and Promoters.

The States of the Union are Corporations, political corporations it is true, but still corporations, with power to sue and be sued, to hold and transfer property and to have perpetual succession, as well as to enjoy all of the other incidents of corporate organization.

The United States is a corporation likewise and no less and as such was established by the People of the United States through their convention called by the States, and ratification by the several States.

The actions, representations, pronouncements and declarations of the Constitutional Convention and its envoys, to the States in urging an adoption of the Constitution, were, one and all, the prospectus, representation and inducement offered and presented to the States to secure a ratification of the Constitution.

Relying upon such arguments, statements and representations, the States surrendered to the Federal Government certain properties and rights absolutely, and certain others in trust, while reserving to themselves expressly or by implication, certain others.

The United States at once and with full knowledge, proceeded to avail itself of the rights, property and advantages so accruing to it and for many years, through its legislature and Courts, considered and recognized such representations, of the benefits whereof it had availed itself, the agreements made by its promoters upon its behalf becoming thereby binding upon the United States and its agencies.

It is unfair and unlawful that Appellees now should avail themselves of any alleged right, claimed to exist against the States, pursuant to the Constitution when the same is in conflict with and contravention of the representations and assurances upon which the States so relied in entering into the corporate organization of the United States.

A Republican Form of Government.

Any construction of the guarantee to every State, of a Republican form of Government, other than the one so agreed, represented, understood and adjudicated is not now open to Appellees, being contrary to good law, good ethics and good morals.

The Appellees are bound by all that binds the United States. Shall the United States work an injustice? "Shall not the Judge of all the earth do right?"

No evasion, quibble, sophistry or contention can obscure, blink or escape the recognized truths, facts and verities which assured the States in their rights as claimed, reserved and conceded.

The arising of a new race which regards not tradition and reads no history can not alter the force of established truth. No changes of times or ideas are capable of altering fundamental facts.

As to the Tenth Amendment.

The law of promotion and promoters may be noted here as affecting the binding force of the tenth and certain other amendments to the Constitution.

Those amendments were passed pursuant to representations and agreements which were a condition precedent to the adoption of the Constitution.

The United States is estopped from their change or breach.

They have become in effect parts of the original document and unamendable as such conditions precedent and as conditions subsequent persisting as long as the agreement shall endure, invocable upon the objection of any several states concerned.

A Taking by Force is the Only Alternative.

Appellees then, must contend and argue that the Federal Government may take, hold and acquire the rights and franchises in question, without color of title or authority.

By means of a constitutional change, itself of doubtful validity as such, a basis would be claimed as established, whereby governmental agents, un-

less directly restrained by the Courts, should proceed in total disregard of the contractual rights of other governmental bodies, outside the scope of the powers by them vested in the Federal Government, and that in direct contravention of property rights, expressly retained by those other governments and to their citizens, individually and through the States, and to them as such expressly guaranteed by the United States.

The Law of Contracts.

Over and above all argument and question as to Constitutional Law, stands out then the questions indicated under the Law of Contracts, which leave to appellees no justification for the possession of property and rights not their own, other than the allegation that they have been taken by another, strong enough to take them, and deposited for use in the hands of appellees.

Such is a dangerous contention, more dangerous in fact and more boldly destructive in form, than were many which have divided nations and disrupted States.

That danger must be apprehended, is shown by legislative activity foreshadowing another constitutional amendment, reducing representation in the House of Representatives in the case of any State which should disregard the Nineteenth Amendment.

Evidently the Federal authorities lack power to enforce directly their title to and possession of the asported franchises of the States. They must resort to indirection, keeping and concealing the property in the Federal preserve beyond the reach and power of its owners.

Other means whereby the Federal possession and employment may be made more directly effective, may be devised later. The organs whereby the States themselves could retain, retake, hold or exercise such property right and franchises may be removed or destroyed through constitutional amendment.

Such simple practice would be in complete accord with the contentions of appellees, who set no limit to the expansion of Federal power and jurisdiction, other than the will of the Federal Government itself, and a *prima facie* compliance with a form of legislative State ratification by a requisite majority.

Such contentions in former causes, have been heeded as to powers reserved to the States.

Here and now it is urged by appellees, that express constitutional guarantees likewise may be overridden.

As to that appellant submits himself to the Court.

WALDO G. MORSE,
Of Counsel for Appellant.

22
Office Supreme Court, U. S.

FILED

JAN 28 1922

WM. R. STANSBURY

CLERK

Supreme Court of the United States.

OCTOBER TERM 1921

No. 148

CHARLES S. FAIRCHILD,
Appellant,

against

CHARLES E. HUGHES, as Secretary
of State of the United States,
and

HARRY M. DAUGHERTY, as Attor-
ney General of the United
States.

PRINTED ARGUMENT FOR APPELLANT.

Everett P. Wheeler, of counsel for appellant, is unable in consequence of sickness to take part in the oral argument, and asks leave to submit the following printed argument embodying what he would say in reply to the argument for the Appellees in this case and for the defendants in error in *Leser versus Garnett*. Many of the arguments for the Appellees are dealt with in the briefs already filed and need not be referred to here.

FIRST. The FIRST TEN AMENDMENTS.

Much stress is laid, particularly in Attorney General Armstrong's brief, on the proceedings in the Convention which framed the constitution. Mr. Gerry is quoted as saying that under the article providing for amendments a majority of the states "can bind the union to innovations that may subvert the state constitutions altogether." This danger was appreciated by the people. In the conventions elected by them to consider the constitution as shown in the principal brief, their sense of this danger was expressed.

They had in mind the famous Bill of Rights which had been adopted by the British Parliament in 1689, after the Revolution which placed William and Mary on the throne, and was presented to them February 15th, 1689. This embodied the fundamental principles of the British Constitution. It declares at the outset that it is framed "for the vindicating and asserting their ancient rights and liberties."

After a statement of these principles, some of which the framers of the American Constitution embodied in the Constitution itself and the rest of which are in substance expressed in the first ten amendments, the English Bill of Rights concludes:

"And they did claim, demand and insist upon all and singular the premises as their undoubted rights and liberties."

It is essential to note that this act of Parliament approved by William and Mary claims these rights as the inherent rights of Englishmen. The act of Parliament is only a formal declaration of them, to which they asked the assent of the king and

queen, not for the purpose of establishing the rights, but solely to bind them to the acknowledgment of the rights.

Encyclopedia Britannica, Vol. 3, pp. 943-944.

All this took place less than a century before the constitution was adopted and just a century before the inauguration of Washington. It was fresh in the minds of the men who ratified the constitution. It was the declaration upon which they had insisted in all their controversy with the British Parliament. They claimed that their rights in the Colonies were the same as those of Englishmen at home and that they were inherent rights. This proposition is expressed in the Declaration of Independence.

"We hold these truths to be self evident, that man is endowed by his Creator with certain inalienable rights, among them life, liberty, and the pursuit of happiness."

The criticism they passed upon the written constitution as proposed for adoption was that it did not contain a statement of these inalienable rights. Therefore, in several of the Conventions; notably those of Massachusetts, New Hampshire, Virginia, New York, and Rhode Island, it was insisted that the adoption of a Bill of Rights was essential. This was proposed in definite form to the other states as shown under the Sixth Point in the principal brief. This proposition was agreed to by all the States and was unanimously ratified by them all as soon as the new Government went into operation. Can there be any doubt historically that it was then unanimously agreed by all the States that the rights declared in the first ten amendments were inherent and inalienable and

that they cannot be subverted by any amendment under Article V? They were adopted subsequent to that article and necessarily control it.

The argument therefore that no such limitation was contained in the original constitution and that under this alone it would have been possible to subvert the State Governments confirms our present proposition. It was the fear of this that led to the unanimous adoption of the first ten amendments. No longer is it possible under color of Article V to subvert the State Constitutions. The question is not what the constitutional convention did but what the states did when they ratified the Constitution.

The case is analogous to that of the Four Power Treaty signed by the plenipotentiaries of the United States, British Empire, France and Japan, December 13, 1921.

Times Current History, Jan. 22, pp. 545-546.

After the signature of this treaty the American delegates presented a reservation note. This obviously was not binding upon the other powers until they accepted it. They did accept it and clearly it is now just as binding as the rest of the treaty.

SECOND. DELEGATED AND RESERVED POWERS.

It is true that so far as the final adoption of amendments is concerned it is a power reserved to the People. But how are the people to exercise this power? Either through conventions or through legislatures. In either case the power is in the people and the only power that either the conventions or the legislatures have is that which

they possess through delegation from the people. The legislature is not the People. The argument that it overlooks the fundamental principle of the American system.

Parliament had claimed to be omnipotent. The colonies revolted against this conception. They had no idea of setting up in America omnipotent legislatures. The argument that these legislatures have absolute power irrespective of the constitution which created them, would have sounded well from the lips of Lord North, but it is repudiated by all American leaders from Jefferson to the present time.

Counsel lay great stress on the decision of this Court in the referendum case. This case did undoubtedly hold that a referendum is not a part of the legislature and that therefore the People of the state, so far as amendments to the Federal constitution are concerned, cannot impose that as an additional condition.

When we refer them to *Haire versus Rice*, 204 U. S. 291, they reply that this decision dealt with a statute and not with the constitution. But what authority is there for saying that words in a statute have any different meaning from words in a constitution. They are both expressed in the English language. Words in this language must have the same meaning whether placed in a constitution or in a statute.

THIRD. CIVIL WAR AMENDMENTS.

The action of Congress after the Civil War was no doubt illogical. I can say so with mere positiveness because I took part in the discussion and argued, as did so many others, that the Southern states had no right to secede, and therefore in the eye of the law never had seceded, and were

entitled to have full privileges as States of the Union. President Johnson took that ground but a two-thirds majority of both houses of Congress overruled his vetoes and the victorious North decided that the secession, *de facto*, had deprived the seceded states of their rights and that it was competent for the North to impose conditions for their readmission. Until they accepted these conditions they were deprived of all suffrage in the Senate as well as in the House.

Counsel refer to the Milligan case, 4 Wallace 2. That denies that any of the "provisions of the constitution can be suspended during any of the great exigencies of government." But this case is not adverse to our contention. It held that it was not lawful in a state which had not seceded, to try a man by military commission during the war. That is not opposed to the doctrine of this court in *Stewart versus Kahn*, 11 Wallace 493-507, quoted on page 43 of the principal brief. The power to declare war is granted by the constitution. It is not by a suspension of this law, but by its enforcement that the government had "inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." This power can be exercised notwithstanding the fact that some of the states might object to the methods adopted by Congress. The fact referred to by the Appellees that Kentucky and Delaware objected at the time to the 14th and 15th amendments could not limit the exercise of the war power. They had been slave States. The right to abolish slavery applied equally to them.

FOURTH. THE SEVENTEENTH AMENDMENT.

This amendment expressly reserves to each state the right to regulate the electorate for the Senate. It rather confirms our argument that this right was considered inherent.

FIFTH. The argument for Appellees shows the vital importance of enforcing the restrictions which the people of each state chose to put upon the powers of its legislature. Appellees insist that the power to amend is unlimited. This means of course that the liberties of the citizens of the United States may be taken away by a majority of the state legislatures under guise of an amendment to the Federal constitution. To assert that there is no power of the People in a State to protect their rights against such encroachment is to declare that we are not a free people.

SIXTH. ACQUIESCENCE.

It is argued that all the States have acquiesced in the nineteenth amendment. This is an erroneous statement. It appears in this record that citizens of ten states have formed a league which is represented here by their President, Mr. Fairchild, in which they claim their rights as citizens under the Constitution. These rights they can vindicate by suit as shown under the Fourteenth Point of the principal brief.

There has been a certain amount of acquiescence by the public authorities. This shows the disposition of the American people to submit respectfully to a proclamation of the Secretary of State until by competent judicial authority it is set aside. This acquiescence is like obedience to an injunction, pending an appeal from the order granting

the injunction. The Fairchild suit is an orderly method, well known to equity jurisprudence, by which individual citizens, apprehending an invasion of their rights, bring an action to prevent officials from violating these rights. Action by these officials *pendente lite* as shown under the Third Point of the principal brief, does not in any way affect the power of the Court in its final decree. But so long as the proclamation of the Secretary of State is on the statute books which are in every law library, and are evidence in every court, it is part of our American system that respect should be paid to it. It would be intolerable if its validity could be contested collaterally wherever there was occasion for action under it.

SEVENTH. PAST ELECTIONS.

The remaining argument that a decree now declaring the invalidity of the proclamation by the Secretary of State of the ratification of the 19th amendment would invalidate past elections, is also based on a misconception of the American system.

Whenever an election is held the votes are canvassed, the certificate of the canvassers goes to the proper authorities, and an orderly way is provided by which the result of the elections as shown by the returns is declared. Any citizens interested in contesting the election must do it by a direct proceeding, and if they claim that illegal votes were cast, must show that the result of the election was affected thereby and that if the illegal votes had not been cast the result would have been different. Probably there never was an important election in this country in which some illegal votes were not cast. But here again an orderly method is provided by which the result

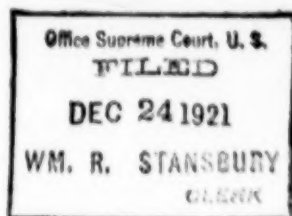
can be tested in due course of law. In the absence of such contest its validity can not be impeached.

It is therefore clear that any decree which the court may make in this case will be prospective only, and will not in any way affect elections which have been already held and the result of which has been duly certified according to law.

EVERETT P. WHEELER,
of Counsel for Appellant.



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IN THE

Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

vs.

CHARLES E. HUGHES, as Secretary
of State of the United States,

and

HARRY M. DAUGHERTY, as Attor-
ney-General of the United
States.

October Term,
1921,
No. 148.

SUPPLEMENTAL BRIEF.

In view of the magnitude of this case and its far-reaching consequence and the necessarily extended historical study in the main brief, we respectfully ask permission to file this supplemental summary presenting in condensed form some of our main contentions concerning the lack of power in Congress to propose or legislatures to affirmatively enact such a measure as the 19th Amendment.

FIRST.

The amending Article V was provided for changing, limiting, shifting or delegating "powers of government." It was not provided to enable the Government to deprive "the People" of the power to amend their State constitutions. The 19th Amendment is therefore *ultra vires*.

Article V was provided as a means by which to change the incidents of Federal governmental Power delegated by the "sovereign people" to their common agency, their Federal Government, to improve the form and structure of said Federal Government, or as lately decided in Rhode Island *vs.* Palmer to "delegate new powers" to that governmental agency.

It was not established to amend, abolish, destroy or limit in any way, the sovereignty of the people, i. e., to determine who shall constitute "the people."

The ultimate sovereignty of the people, as expressed in the free determination of suffrage qualifications, the right of the people to determine for themselves who shall exercise their sovereignty, who shall govern them, is not even delegated to their State Governments, but reserved under the control of the people themselves in their State Constitutions. Changing the "sovereign Power" is not an end or purpose of the Federal Government. The amending clause was not provided for "Amending the people." The people were not setting up an amending agency for their own destruction. The powers of their Federal governmental agency were not limited, and those limits committed to writing, to the end that the sovereign

people, who themselves imposed the limits, should have their sovereignty destroyed, infringed or impaired by agents selected to change these "powers of government," perfect the Federal Government, or grant to it new governmental powers. The creature is not greater than the creator.

Popular election was provided for only one office created by the Federal Constitution—members of the House of Representatives. For this office "the electors in each State shall have the qualifications for electors of the most numerous branch of the State legislatures." Art. 1, Sec. 2.

This is more than a uniform rule for the exercise of State authority. It is more than the recognition of the residuary sovereignty of the people of the States, from whom a "grant of powers" for a Federal governmental agency was being asked, as applicable to the election of each State's representative in the Federal House. It was the adoption of the same *basis* of sovereignty for the Federal Union as existed in the States. It was a recognition that the "sovereign people" who were asked to ratify in their States were the "same sovereign people" who were to constitute the ultimate sovereignty under the Constitution.

The same "sovereign people" who governed their individual States, to whom the Constitution was submitted and by whom it was ratified, who through their own State government were to appoint electors for their Federal Executive, and through their own State legislatures (now by their own direct votes) were to choose their Senators in the Federal Senate; were by Section 2 of Article 1 established and *constituted as the popular sovereignty* for the only office to be directly elected in their Federal government, then being erected by themselves, "in order to form a more

perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

SECOND.

By extra constitutional means in both proposal and ratification the amending power was the *form used* for expressing the results of revolution after the civil war. By submission to *vis major* followed by the unanimous "consent" of all the States and the acquiescence of all the people of the United States, the entire Nation was "reconstructed," made anew, to permanently establish the freedom and equality of the negro race, for which the civil war was fought, by constituting said race part of the sovereign people of the United States.

The fact was "revolution." The form of settlement happened to be through the Amending Clause, a use thereof only sanctioned by the "Laws of War." This extra Constitutional procedure was, however, acquiesced in by all. Any other method for permanently registering the inexorable decree of civil war would have been equally effective. It simply *under that form* registered in the organic law the fact already accomplished.(1)

(1) In most if not all the seceded States, either through the "reconstruction" State Constitution or by military fiat the freedmen had been permitted to vote before the 15th Amendment was adopted. The freedmen of those States thus previously enfranchised elected the legislatures whose affirmative votes made up the necessary three-fourths for the 15th Amendment. Their situation was analogous to that of the 15 Woman-suffrage States today, except that their Constitution had been changed not voluntarily but under the coercion of military rule.

Here no "revolution" is to be settled, no subject race freed, no peace terms to be imposed on rebel states, but the form used in that revolutionary act is now invoked to *destroy the sovereignty of the people.*

THIRD.

Article V itself (aside from revolutionary sanction) was never intended to deal, could not in the nature of the case deal with or affect the sovereignty of the people.

Here it is attempted through its use to *attack, limit and fossilize* the people's sovereignty in their State and local elections as well as in the election of Federal representatives and in the choice of legislatures and conventions to assent to or dissent from proposed Federal Amendments. When they ratified the Constitution, the people were not asked to cede their sovereign power nor to delegate, to any agents whatsoever, the right to interfere with their sovereignty. And Sec. 2 of Art. 1, recognized its continuance in them as before.

The ultimate sovereignty of the people exists in their States, outside their Federal Constitution, outside and beyond their Federal Government. An amending clause for perfecting and changing the Federal Constitution, bears no relation to the sovereignty of the people, can not deal with it, can not amend or destroy it. Their sovereignty and its ultimate expression through suffrage remains the same forever, until changed by the people themselves, by their own political action in amending their State Constitutions, where they have deposited it, unless forcibly changed by rev-

olution. Assembled in State conventions for the purpose of discarding their present form of government and adopting a new one, as they adopted the present Constitution, they could of course change it or surrender it. They could thus surrender their ultimate sovereignty to a king, to an aristocracy, to a dictatorship (of the proletariat or otherwise). But this again amounts to revolution. No mere legislatures, acting representatively in amending a mere "grant of powers" for Federal purposes (which is all the Constitution is), can take upon themselves the sovereignty of the people and determine for them, by practically irrepealable rule, who shall govern them, who shall exercise their sovereignty.

The Federal Constitution did not destroy the sovereignty of the people. It protected it, both in the perpetual proviso in Article V itself and in the whole scheme of the instrument. The Federal Constitution is not a grant of "sovereignty," but a mere grant of Federal powers to a common agency, created to protect and preserve the rights of the people and to safeguard in perpetuity their sovereign power.

As Madison said in the *Federalist* Art. 46:

"The Federal and State Governments are in fact but different agents and trustees of the people instituted with different powers and designated for different purposes."

(Cited by Chief Justice Fuller in *Pollock vs. Farmer L. & T. Co.*, 158 U. S. 560):

"The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies but as un-

controlled by any common *superior* * * * The ultimate authority, wherever the derivative may be found, resides in the *people* alone * * *. Truth no less than decency requires that the events in every case, should be supposed to depend on the sentiments and sanction of their *common* constituents."

The power of the Amending Agents is necessarily limited to the Federal grant which did not include the right to grant or withhold suffrage, the determination of who shall exercise the sovereignty of the people. This same sovereignty of the people who ratified the Constitution "the original fountain of power" acting in their States, has been recognized by this Court ever since the decision in *McCulloch vs. Maryland* (4 Wheaton 403) as the source of the grant itself and of all new governmental powers added thereto by amendment. Having taken no sovereignty away from the "people" who ratified, having constituted no new sovereignty in the Constitution itself, it conclusively follows, that no provision for amending or changing this mere grant of governmental powers can subtract from the sovereignty of those who made the grant, the sovereign people of the United States.

Alexander Hamilton (in 52nd Federalist) spoke of the definition of suffrage as being "a fundamental article of republican government" properly beyond legislative control, which it was incumbent on the convention to establish in the Constitution. And that *as so established* in Article I it was rightly *not* subject to regulation by either Congress or the State Legislatures adding:

"It must be satisfactory to every State because it is conformable to the standard estab-

lished or *which may be established* by the State itself."

This of course was untrue if Congress and outside legislatures could dictate a State's suffrage. He continues:

"It will be safe to the United States because being fixed by the *State Constitutions*, it is not alterable by the *State governments*."

Later, in 59th Federalist, while defending Congressional control of the "times, places and manner" of elections for the Federal House, he said:

"Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections *for the particular states*." * * * This would be * * * "an unwarranted transposition of power and a premeditated engine for the *destruction of the state governments*." * * *

"Each" (the Federal and State Governments) as far as possible ought to *depend on itself for its own preservation*."

Then urging that because the States could refuse to elect Senators, was no reason for giving them similar power over the House, he said:

"So far as the mode of formation (he was speaking of the Senate) may expose the Union to the possibility of injury from the State legislatures it is an evil; but it is an evil, which could not have been avoided without *excluding the States, in their political capacities*, wholly, from a place in the organization of the National government. If this had been done it would certainly have deprived the State governments of that *absolute safeguard* which they will enjoy under this provision."

He was speaking of the "constitution of the national senate" as permitting the States to refuse to elect Senators. The "absolute safeguard" referred to is the "equal suffrage of the States" in the Senate made safe from amendment by Article V.

Thus Hamilton demonstrates:

(1) That under the Federal Plan of the Constitution "determination of suffrage qualifications" was within the sphere of neither Federal or State *Governments*, but rests with the *people* alone through their State Constitutions.

(2) That outside interference with the internal elections of a State (even without dictating the suffrage qualifications of her people) destroyed the State and was not contemplated by the plan,

(3) That to deprive a State of the unhamp-ered right to select, or even refuse to select, her own Senators, would violate the compromise establishing the "equality of the States in the Senate" made perpetual by the plan.

Thus did the most extreme advocate of Nationalism honestly and persuasively expound the constitution while urging the people of New York to ratify. (2)

FOURTH.

If in spite of the Tenth Amendment new legislative *powers* may be conferred on Congress, as

(2) See also the debate on Article V (5 Ell. Deb. 532, printed as an appendix to brief of Plaintiff in error in *Leser vs. Garnett*, No. 553).

This debate shows that the possibility of destroying the ultimate sovereignty, i. e., the *power to consent* which means the *power to vote* was considered by the convention as a *conceivable* *misconstruction* of the amending power and therefore *expressly* *withdrawn*.

appellees claim, they must be *governmental* powers, not sovereignty. Suffrage at least cannot be fossilized. The people's sovereignty is forever reserved to them in their several States.

Even if the Tenth Amendment can be modified *pro tanto*, as appellees claim, by transferring a State *Legislative* Power to the Congress, thus leaving somewhere to the people's representatives legislative power for modification or repeal; nevertheless we maintain that the 10th Amendment cannot be violated in a matter not affecting a *Governmental* Power by setting up a rigid, practically irrepealable, self-executing, rule of sovereignty. Suffrage is sovereignty.

The Nineteenth Amendment attempts to destroy, in part, the people's right to repeal, amend or modify "local suffrage qualifications" except with the permission of stranger legislatures of other States whom they cannot influence or control.

In other words, if the Tenth Amendment does not prevent the addition of new National Legislative Powers it does prevent the fossilization of "local suffrage" leaving no democratic remedy in the people in Congress, or in State Legislatures to change or modify it. It does prevent the destruction of all power over suffrage either by the people themselves or through legislative bodies *in which they are represented*.

If State control is destroyed National control at least must be substituted. Some *democratic* remedy for repeal or modification must remain.

Irrepealable legislation controlling the people's sovereignty has no place in the democratic Government of the United States. If "local" self-government can be destroyed some sort of "self-government" must at least remain.

Appealing to stranger legislators (perhaps 3,000 miles away) whose opinions we can neither influence nor affect, *because they are not responsible to us*, to relieve us from *obnoxious* suffrage rules affecting our right to vote is *most emphatically not a political remedy*. It by no stretch of the imagination can be called *self-government*. It is the slave's petition to irresponsible power. Likewise the imposition upon us of such unchanging suffrage rules is not an *orderly, responsible democratic process of government*.

The Tenth Amendment certainly protects us from that kind of tyranny. The true rule is stated by this Court in *re Duncan*, 139 U. S. 449, 461:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

EVERETT P. WHEELER,
Of Counsel for Appellant.

See Message of Pres. Monroe, of Apr. 1822
II "Misc. + Papers of Presidents"
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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES S. FAIRCHILD, APPELLANT,	} No. 148.
v.	
CHARLES E. HUGHES, AS SECRETARY OF State of the United States, and Harry M. Daugherty, as Attorney General of the United States.	

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

BRIEF FOR THE APPELLEES.

STATEMENT.

On July 7, 1920, the appellant, Fairchild, a citizen and resident of the State of New York, for himself and on behalf of the members of the American Constitutional League, organized to "uphold and defend the American Constitution against all foreign and domestic enemies," filed in the Supreme Court of the District of Columbia an original bill to enjoin Bainbridge Colby, as Secretary of State, his assistants, subordinates, and agents, from issuing any

proclamation declaring "that the so-called suffrage Amendment has been ratified or that it has become a part of the Constitution of the United States," and to enjoin A. Mitchell Palmer, as Attorney General, his assistants, subordinates, and agents, "from enforcing said Amendment." (R. 1-14.) The bill alleged that the American Constitutional League is an association composed of citizens of various States, who are taxpayers in their respective States and who, with one exception, have the right to exercise the elective franchise therein.

Numerous contentions are advanced in the bill, all of which resolve themselves into the proposition that the suffrage or Nineteenth Amendment was not validly adopted.

A rule to show cause why an injunction *pendente lite* should not be granted was issued, and on July 13, 1920, the Secretary of State and the Attorney General filed their return thereto, together with a motion to dismiss the bill. (R. 15, 16.)

On July 14, 1920, the Supreme Court of the District of Columbia, on final decree, dismissed the bill and discharged the rule to show cause, and plaintiff noted, and was allowed, an appeal to the Court of Appeals of the District of Columbia. (R. 16.)

On August 26, 1920, the Secretary of State issued a proclamation of the ratification of the Nineteenth Amendment (an event of which this court will take judicial notice), which was in full force and effect when the elections of November, 1920, were held. (R. 21.)

On September 21, 1920, the Secretary of State and the Attorney General filed in the Court of Appeals of the District of Columbia a motion to dismiss or affirm (R. 21-23), and on October 4, 1920, that court affirmed the decree of the Supreme Court of the District of Columbia on the authority of its previous decision in *United States ex rel. Widenmann v. Colby* (49 App. D. C. 358, 265 Fed. 998). This appeal was then taken.

The Widenmann case was brought to this court on writ of error. On motion by the Government to dismiss or affirm, filed at the present term (No. 92), this court, on December 19, 1921, affirmed the judgment of the Court of Appeals on the authority of the *National Prohibition Cases* (253 U. S. 350).

In the case at bar, Charles E. Hughes, the present Secretary of State, and Harry M. Daugherty, the present Attorney General, were on April 11, 1921, by order of this court, substituted as parties appellee in the place of Messrs. Colby and Palmer.

The Court of Appeals affirmed the decree of the Supreme Court of the District of Columbia in the present case on the authority of *Widenmann v. Colby* (49 App. D. C. 358, 265 Fed. 998). That case was a suit for mandamus to compel the Secretary of State to cancel the proclamation of ratification of the Eighteenth Amendment, it being contended that the Amendment had not been validly adopted. It was not alleged in the petition, nor otherwise claimed, that the Secretary of State had

not received official notice of ratification from the requisite number of States, but it was asserted that the officials of several of the States should not have issued the notices. The Court of Appeals, affirming the judgment of the Supreme Court of the District of Columbia, dismissing the petition, held that under section 205, Revised Statutes, the Secretary of State is required to issue his proclamation of an Amendment to the Constitution of the United States on receipt of notice from the required number of States of ratification of the Amendment, and has no discretion to determine the truth of the facts stated in the notices; that therefore the Secretary of State, instead of having failed in the case at bar to perform a duty imposed upon him by statute, the performance of which should be coerced by mandamus, had performed a duty enjoined upon him by statute in issuing the proclamation in question; and that, under the circumstances, there was no basis for the relief sought by the petitioner.

It was further held that even if the proclamation was canceled by order of the court, it would not affect the validity of the Amendment, inasmuch as, under Article V of the Constitution, it is the approval of the requisite number of States that gives validity to a constitutional Amendment, and not the proclamation of ratification by the Secretary of State, so that petitioner had no interest in the prayer of his petition, because, if granted, it would have availed him nothing.

The principal ground of relief sought by appellant in his bill was to prevent the Secretary of State from proclaiming the ratification of the suffrage Amendment. The prayer for an injunction to restrain the Attorney General from enforcing the Amendment was obviously incidental to the main relief requested. I know of no statutory duty which requires the Attorney General to enforce the Amendment. This brief, therefore, deals with the case principally from the standpoint of the Secretary of State. The Government has, however, made particular comment upon the allegations of the bill relating to the Attorney General at page 36 of this brief.

The Government contends that this appeal should be dismissed or the decree of the Court of Appeals affirmed, for the following reasons:

- (a) The case presents only moot questions.
- (b) The plaintiff has shown no status to raise these questions, as no concrete "case" of conflicting rights is presented, but only a request that the Court determine abstract questions *in thesi*.
- (c) The questions raised by appellant are foreclosed to decision by the judiciary.
- (d) Except only as limited in Article V, the Constitution may be amended in any respect deemed advisable.

I.

The Plaintiff's Status.

The judicial power is limited to "cases arising in law and equity" under the Constitution and laws of

the United States, and a preliminary question arises as to whether this appellant and those in behalf of whom he sues have any such standing in the matter now before the court as entitles them to be litigants in the instant case. I make this point with hesitation and reluctance, for I fully appreciate the fine spirit and the patriotic motives which induced the appellant and the members of the American Constitutional League to institute this suit. Whether they are right or wrong with respect either to the merits of woman suffrage or to the validity of the woman suffrage Amendment, I freely recognize that the suit is instituted by men whose only motive is to defend the Constitution as they interpret it. If there were more such men, who not only believe in but were willing to work for the maintenance of our institutions, there would be in this country a finer sense of what Grote calls "constitutional morality."

Nevertheless, the question remains whether the status of the appellant is such as to make this a concrete case within the Constitution. He is a well-known and justly honored citizen of the United States; but such fact alone does not entitle him to raise constitutional questions *in thesi*; otherwise it would be within the power of every citizen in the country to challenge the validity of laws, without respect to the question whether he or she was so especially and practically affected by the challenged law that its enforcement would mean a deprivation of some vested right. A "case" arises under the Constitution when a practical conflict of interest arises be-

tween two litigants and one of them asserts the application of a statute and the other asserts that the statute is invalid because it is repugnant to the Constitution. Then—and then only—is this court required in adjusting the controversy to decide whether such repugnancy in fact exists; and the fact that this court does not go forward to meet such questions, but waits until a truly litigated controversy comes to it, is justly regarded as one of the peculiarly beneficent institutions of our country.

In the absence of such a real controversy no one can ask this court to give an opinion upon an abstract proposition of law. Even the President could not ask the opinion of the court until a concrete controversy arose. At the beginning of our Government President Washington requested the Supreme Court to give an opinion on an abstract question and the court unanimously declined to do so, as beyond their power. If the Chief Magistrate may not do so, can it be that any citizen may file a bill which virtually asks the court to express an opinion as to the validity of a law, and, *a fortiori*, a presumptive part of the Constitution, until, in some practical way, the invalid law or part of the Constitution affects him in some direct way?

It is true that the appellant alleges that he is a taxpayer; but no question of taxation is directly involved in this suit, and the connection between it and the suffrage Amendment is too remote.

Such a question may be raised in a proper way. If, for example, a woman otherwise qualified for registry

as a voter were denied the right of registry under a State law which denied women the right to vote, then she would have a direct interest upon which a "case," within the meaning of the Constitution, could be based.

The appellant's interest is only the general interest which every citizen has in the maintenance of the Constitution, and that, I respectfully submit, is too general and not sufficiently concrete to justify the institution of a suit at law or in equity.

My duty to the court compels me to make this point, lest its silence, if the court proceeds to hear the controversy on its merits, might seem to justify the belief that a case could be instituted by any citizen with no other basis than his general interest as citizen in the perpetuation of our institutions.

II.

The Case Presents a Moot Question.

This court has often decided that it will not consider and pass upon cases presenting merely "moot questions or abstract propositions."

California v. San Pablo & Tulare R. R. Co., 149 U. S. 308, 314; *United States v. Hamburg-American S. S. Co.*, 239 U. S. 466, 475; *United States v. American-Asiatic S. S. Co.*, 242 U. S. 537; *Commercial Cable Co. v. Burlison*, 250 U. S. 360; *United States v. Alaska S. S. Co.*, 253 U. S. 113.

The principal relief sought by the appellant in his bill was that the Secretary of State be re-

strained "from issuing any proclamation that the so-called suffrage Amendment has been ratified or that it has become a part of the Constitution of the United States." After the dismissal of the bill by the Supreme Court of the District of Columbia, but before the hearing of the appeal in Court of Appeals, the Secretary, having received official notice that the requisite number of States had ratified the suffrage amendment, issued, pursuant to Revised Statutes, section 205, his proclamation of ratification on August 26, 1920 (R. 21), an event of which this court will take judicial notice. (*Dillon v. Gloss*, decided by this court on May 16, 1921; not yet officially reported. See, however, 41 Sup. Ct. Rep. 510, 513.)

Section 205, Revised Statutes, explicitly directs that—

Whenever official notice is received at the Department of State that any Amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the Amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Appellant does not contend that the Secretary did not receive official notice of the Amendment's ratification from the required number of States. His con-

tention is that several of the State legislatures were without power to ratify the Amendment, and that the State officials should not, therefore, have forwarded the notices.

It is obvious that there is now no occasion for this court to determine whether the relief prayed by appellant should have been granted, inasmuch as the act sought to be enjoined has been consummated.

The conditions now existing in the instant case are analogous to those which were present in *Wilson v. Shaw* (204 U. S. 24). In that case suit was brought in the Supreme Court of the District of Columbia to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of the Panama Canal and also to restrain him from constructing the canal, borrowing money for that purpose, and issuing bonds therefor. The Supreme Court of the District of Columbia dismissed the bill, and its decree was affirmed by the Court of Appeals. On appeal to this court, Mr. Justice Brewer said (p. 30):

If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, \$40,000,000, to the Panama Canal Company, and \$10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, that those payments have been made, and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question. (*Cheong Ah Moy v. United States*, 113 U. S. 216; *Mills v. Green*, 159

U. S. 651; *American Book Co. v. Kansas*, 193
U. S. 49; *Jones v. Montague*, 194 U. S. 147.)

For the reason stated, and upon other grounds not here material, the decree of the Court of Appeals was affirmed.

As in the *Wilson* case, so in the present suit it is sufficient to note the fact that the act sought to be restrained—the issuance by the Secretary of State of the proclamation of ratification of the suffrage Amendment—is now an accomplished fact.

It is true that appellant now seeks to change the form of relief desired into that of a mandatory injunction requiring the Secretary of State to issue a proclamation rescinding his former proclamation (Brief, p. 77), but this can not serve to eradicate the moot character of the instant case. Appellant stands in no better position before this court by altering the form of relief asked, for it is indisputable that it is not the proclamation of the Secretary of State, but the ratification by the requisite number of States, that gives vitality to an Amendment and makes it a part of the Constitution of the United States. Article V expressly provides that a proposed Amendment “shall be valid to all intents and purposes, as part of this Constitution, when *ratified* by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.” The proclamation of the Secretary of State does not affect the validity of an Amendment. It is

obvious, therefore, that it would avail appellant nothing if the Secretary were required, as appellant now seeks, to rescind his proclamation of ratification, for the validity of the Amendment would not, in anywise, be affected. (See opinion Court of Appeals in *Widemann v. Colby*, 49 App. D. C. 358, 265 Fed. 998.)

The probable recurrence of the questions involved in this case can not serve to give "life" to the present proceeding. As was said in *Commercial Cable Co. v. Burleson* (250 U. S. 360, 362):

We are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason.

Nor is the situation changed because the action of the Secretary of State in proclaiming the ratification of the Amendment occurred during the pendency of this suit. Plainly the doctrine announced in *Wingert v. First National Bank* (223 U. S. 670, 672, referred to by appellant at page 15 of his brief), that "after the filing of a bill for an injunction defendants proceed at their peril even though no injunction is issued, and, if they go on to inflict actionable wrong upon the plaintiff, will not be allowed to defeat the jurisdiction of the court by their own act," has no application to the present case. The act of the Secretary of State in issuing his proclamation was not one which he could do or not as he saw fit. It was one specifically required and enjoined upon him by section 205,

Revised Statutes, upon receiving official notices of ratification from the required number of States. There is no contention in this proceeding that he did not receive the requisite notices. This phase of the question, therefore, falls clearly within the express language used by this court in *Mills v. Green* (159 U. S. 651). The court said (p. 653):

It necessarily follows that when, pending an appeal from the judgment of a lower court, *and without any fault of the defendant*, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. (*Italics ours.*)

As the review sought by this appeal would, under the circumstances, be confined merely to the "abstract question" of the validity of the suffrage Amendment, the appeal should be dismissed, or the decree of the Court of Appeals affirmed.

III.

The contention that the Amendment to the Federal Constitution which extends the right of suffrage within the States thereby deprives the States of a republican form of government does not present a judicial question.

The fourth section of the fourth Article of the Constitution, which provides that the United States shall guarantee to every State in the Union a republican form of government, has been invoked in this court

upon several occasions; but upon each occasion the court has decided that the question whether the government of a State was republican in its nature is not a judicial question. For example, in *Luther v. Borden* (7 How. 1, 42), the court said by Chief Justice Taney:

When the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal. * * * The right to decide is placed there, and not in the courts.

Similar decisions were reached in *Pacific States Telephone & Telegraph Co. v. Oregon* (223 U. S. 118) and in other cases.

IV.

That contention, moreover, is clearly frivolous.

Since the adoption of the Constitution the right of suffrage has been repeatedly extended to more and more classes of citizens, both in the United States and throughout Europe, and yet no one has ever suggested that a State deprives itself of a republican form of government when it adopts universal suffrage. Nor can it be contended that when the Federal Government requires the States to extend the right of suffrage to women it thereby deprives the States of governments republican in

form. More than 50 years ago the right to vote was extended to the Negroes in language almost identical with that employed in the Nineteenth Amendment, and although the Fifteenth Amendment has been before the courts repeatedly no one has ever considered it possible to contend that when the Federal Government extended suffrage to the Negroes it deprived any State of a republican form of government.

It is true that the plaintiff contends that the Fifteenth Amendment does not constitute a valid precedent in view of the conditions prevailing in Reconstruction times. But this contention was answered by the Court of Appeals of Maryland last June in the suffrage case of *Leser v. Garnett* (114 Atl. 840). The court there said (p. 846):

It was contended that the Fifteenth Amendment was a "war" Amendment, adopted at a time when men's passions and prejudices were aroused, and when restraints or limitations of any kind were irksome and intolerable and when the people were impatient and intolerant of anything that stood in the way of their will, and were unwilling to be shackled or hindered in the execution of their plans by mere constitutional limitations, and that therefore the adoption of this Amendment should not be accepted as a precedent, nor the decisions recognizing its validity accepted as conclusive of this case, for that reason, and for the further reason that the Fifteenth Amendment had been acquiesced in for so long that

such acquiescence was in itself equivalent to an express ratification by the States.

But we can not, in the face of the direct language of the Constitution describing the manner in which it may be amended, recognize the doctrine of amendment by acquiescence as a valid substitute for that method. Nor can we assume, no matter what the state of the public mind may have been, that the court, charged with the duty of guarding and supporting the Constitution, tacitly ratified its violation; but we must, on the contrary, **assume** that when it recognized the validity of the Amendment it did so in the belief that it was within the amending power of the Constitution.

Nor can we assume, because the court did not, in the cases to which we have referred, specifically discuss the extent of the amending power of the Constitution as affecting the validity of the Fifteenth Amendment, but assumed without assigning reasons for its conclusion that the Amendment was valid, that it did not consider every question involved in its conclusion. Nor can it be assumed that it permitted its conclusions to rest upon the authority of an Amendment which was proposed, adopted, and ratified in violation of the Constitution, whether that question was or was not directly put in issue by the pleadings or the arguments in the case. And when, therefore, in the cases cited, it based its decisions upon the assumption that the Fifteenth Amendment is a valid Amendment, we are bound by those decisions to

assume that it is a valid Amendment, and within the amending power, for there can be no other conclusion. The only power of amending the Constitution is that furnished by itself. Unless any Amendment the validity of which is questioned can be brought within that power, it must fall. When, therefore, the validity of an Amendment is upheld by competent authority, it can only be upon the theory that it is within the amending power of the Constitution; and when the Supreme Court assumed the validity of the Fifteenth Amendment, it necessarily decided that it was within the amending power. And, as the Nineteenth Amendment can not be distinguished in principle from the Fifteenth Amendment, it follows that it is within the amending power.

V.

The question whether the proposed Amendment to the Constitution has received the approval of the necessary number of State legislatures is not a judicial question.

The Secretary of State, by proclamation dated August 26th, 1920, declared that it appeared from official documents on file in the Department of State that the proposed Nineteenth Amendment had been ratified by the legislatures of 36 States, which he named in the proclamation, that the States whose legislatures had so ratified the said proposed Amendment constituted three-fourths of the whole number of States in the United States, and that by virtue

and in pursuance of section 205 of the Revised Statutes of the United States he did thereby certify that—

the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

The plaintiff does not deny the truth of the statement in this proclamation that the Secretary of State has received from each of the 36 States named in this proclamation official notice that the legislatures of those States had approved the proposed Amendment. The plaintiff contends, rather, that, disregarding the proclamation of the Secretary of State, disregarding the provisions of section 205 of the Revised Statutes, and disregarding the certificates of the proper State authorities, this court may go behind those certificates and determine whether the proposed Amendment has been, in reality, approved by the necessary number of States.

(In view of the fact that two States have approved the proposed Amendment since the date of the proclamation by the Secretary of State (Appendix B), it would be necessary for the court to determine that the appropriate officials of three States have improperly certified to action of those States before the court can declare that the Amendment has not received the approval of the necessary number of States.)

It is submitted, however, that the certificate of appropriate State officials that the legislature of a State has approved a proposed Amendment to the

Constitution of the United States is conclusive. It is so made by section 205 of the Revised Statutes; and this court may properly so treat it.

The court has held repeatedly that where an act of Congress is before it the enrolled and signed bill is conclusive and the court will not go beyond it to the journals for the purpose of determining whether the bill has in reality received legislative approval.

Field v. Clark, 143 U. S. 649, 672, 673, 680, where the question is discussed exhaustively. See also *Flint v. Stone Tracy Co.*, 220 U. S. 107, 143; *Rainey v. United States*, 232 U. S. 310, 317; *Lyons v. Woods*, 153 U. S. 649, 660, 663; *Harwood v. Wentworth*, 162 U. S. 547, 562; *The King v. Arundel, Hobart*, 109, 109b, 111 (English statutes); *Lapeyre v. United States*, 17 Wall. 191 (the date given in a presidential proclamation establishes conclusively that it was signed on that date); *Doe v. Braden*, 16 How. 635, 657, 658 (court may not inquire whether the person who ratified a treaty on behalf of a foreign nation had power to ratify it).

It seems that the same rule should be applied to the certificate of the officials of a State that the legislature of that State has ratified an Amendment to the Constitution. The court is not considering State action, for a legislature, in passing upon an Amendment, is not limited by restraints in the State constitution.

Hawke v. Smith, 253 U. S. 221, 230.

The legislature is performing a Federal function. If, therefore, the court, when considering Federal legislation, may treat the enrolled and signed bill as conclusive, and may do so in spite of very specific provisions in the Constitution as to the manner in which acts of Congress shall be passed, the court may equally follow Federal law in treating the certificates of the State officials concerning a proposed Amendment to the Federal Constitution as conclusive.

Moreover, an inquiry into the truth of certificates of State officials that their States have approved an Amendment to the Constitution is no more judicial in its nature than would be a similar going behind the certificates of election of Presidential Electors, or of Members of the Senate or House of Representatives, or an inquiry whether a State possesses a republican form of government. Such questions are not judicial in their nature; and neither the Constitution nor Congress has extended the jurisdiction of the courts to cover such cases.

Indeed, when William H. Seward, Secretary of State, issued a proclamation declaring that if the resolutions of the legislatures of Ohio and New Jersey ratifying the Fourteenth "Amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid Amendment has been ratified in the manner hereinbefore mentioned, and so has become

valid, to all intents and purposes, as a part of the Constitution of the United States," the Senate and House of Representatives promptly adopted a concurrent resolution declaring that the Fourteenth Amendment had been duly ratified, and directing that it should be duly promulgated as such by the Secretary of State, whereupon Secretary Seward issued a new proclamation certifying that the said Amendment had "become valid to all intents and purposes as a part of the Constitution." (See Appendices C and D.)

So far as counsel have been able to discover, the power which Congress exercised in that case of deciding that the Fourteenth Amendment had been duly ratified has never been challenged in the courts during the 54 years which have elapsed since 1868, although the Amendment has been considered by this court at least a thousand times, and although it has been constantly invoked in the State and lower Federal courts.

The methods pursued by those who favored the Amendment have been criticized elsewhere. The Senate and House of Representatives of New Jersey, for instance, on May 5, 1868, adopted a resolution purporting to withdraw the assent of that State and declaring that 11 States had been excluded from Congress in order to secure the assent of two-thirds of both Houses to the submission of the Amendment; and that, finding that the assent of two-thirds of the remaining States could not be obtained, the Senate had ejected one of the Senators from New Jersey,

without pretext or justification, in order to carry out the Amendment.

Flack, *The Adoption of the Fourteenth Amendment*, 166.

And the Legislature of Oregon, in October, 1868, declared that its ratification in 1866 had been effected by the votes of two members who were illegally and fraudulently returned, and that three days after that ratification the two members whose votes had secured it had been declared not entitled to their seats, and that on the same day the two duly elected members had entered their protest on the journal of the house, declaring that if they had not been excluded from their seats they would have voted against the Amendment and thereby defeated its adoption.

Thorpe, *Constitutional History of the United States*, III, 400; Flack, *The Adoption of the Fourteenth Amendment*, 167, 168.

But, in spite of all the charges which have been made concerning the adoption of the Fourteenth Amendment, the question whether the Amendment was duly ratified has never been regarded as a judicial question by Congress, by the courts, nor by any of the thousands of interested parties throughout the United States at any time during the past 54 years.

In *White v. Hart* (1872, 13 Wall. 646), the court intimated that the manner in which the assent of Southern States to the Reconstruction Amendments had been secured could not be considered by the

courts because the courts were concluded by the action of the political department of the Government.¹ The court might well have quoted the language of Chief Justice Taney in *Luther v. Borden* (7 How. 1, 39):

In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

This court certainly would not have attempted to decide whether the assents which had been recorded in favor of the Reconstruction Amendments had been properly so recorded.

As with the Fourteenth Amendment, so also in the case of the Nineteenth Amendment, the people of the

¹ In *White v. Hart* the State constitution impaired the obligation of contracts. It was contended that "her constitution was adopted under the dictation and coercion of Congress, and it is the act of Congress, rather than of the State; and that, though a State can not pass a law impairing the validity of contracts, Congress can, and that, for this reason also, the inhibition in the Constitution of the United States has no effect in this case." The court said that the proposition "is clearly unsound, and requires only a few remarks. Congress authorized the State to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional Amendments. The action of Congress upon the subject can not be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the Government and is concluded by it." (Our italics.)

In criticism of the requirement of the ratification of the Fourteenth Amendment as a condition precedent to the readmission of the Southern States to their full constitutional rights, see Willoughby on the Constitution, page 523.

United States have acted on the belief that the proclamation of the Secretary of State was a conclusive pronouncement that the proposed Amendment had become a part of the supreme law of the land. The elections of 1920 and of 1921 have been held in accordance therewith. A President, a House of Representatives, and one-third of the Members of the Senate have been elected under the Amendment. So also have many governors, State legislatures, judges, and State and local officials. The country has given an interpretation which should not be lightly set aside—which possibly could not be set aside without impeaching all the elections which have been held since August 26, 1920, except in those States in which woman suffrage had been previously established by State law.

VI.

The Judiciary is without power to decide political questions.

In my oral argument in the case of *State of Texas v. The Interstate Commerce Commission and the Railroad Labor Board* (Original No. 24, present term), I referred to the struggle in the Constitutional Convention as to whether or not the judiciary should have a general power of revision over both the wisdom and validity of the laws, both of State and Nation, in analogy to the power which had been exercised for many years by the French courts over legislative edicts. I showed that while such a power was thrice advo-

eated in the Constitutional Convention, and by some of its most distinguished members, and once lacked only a single vote to pass it, the Convention finally voted down any proposition that would give to the judiciary a general revisory power over legislation.

What the Constitutional Convention finally did was to grant to the judiciary power in "cases" arising either in law or in equity to determine which of two repugnant laws should apply to the facts of a concrete case; and this was the extent of the delegation of power. The framers of the Constitution drew a clear line of distinction between judicial power and extrajudicial power.

The evidence of the truth of this will be found in the proceedings of the convention in framing the text of the clause, which is the beginning of section 2, III, which reads:

The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority.

The history of the formation of this text may be begun by quoting Randolph's and Madison's motion, passed on June 13, which reads:

That the jurisdiction of the national judiciary shall extend to cases which respect the collection of national revenue, impeachments of any national officers, and questions which involve national peace and harmony.

This resolution is repeated *verbatim* in the series of resolutions reported, June 19, by the committee of the whole.

On July 18 the clause of "impeachments of national officers" was stricken out and it was then unanimously resolved to alter the said thirteenth resolution so as to read "That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

This resolution is reported *verbatim* in the series of resolutions stated by the Journal to be referred to the first committee of five with instructions to report a Constitution.

On August 6 that committee reported the draft of a Constitution. The beginning of the third section of its eleventh article reads:

The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States.

On August 27, when the eleventh article of the draft Constitution was under consideration, and the above text was reached, the following proceedings took place as reported by Madison:

Dr. Johnson moved to insert the words "*this Constitution and the*" before the word "laws." Mr. Madison doubted whether this was not going too far, to extend the jurisdiction of the court *generally to cases arising under the Constitution*, and whether it ought not to

be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department. The motion of Dr. Johnson was agreed to, *nem. con.*, it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature.

The beginning of the section thus then read:

The jurisdiction of the Supreme Court shall extend to all cases arising under this Constitution and the laws of the United States and treaties made or which shall be made under their authority.

In spite of the true construction of the amended text being generally supposed in the convention to mean that the jurisdiction of the Supreme Court, in cases arising under the Constitution, was extended to cases of a "judiciary" nature and not extended to all cases generally whether judicial or extrajudicial, Madison was not satisfied. Not long after, while this section was still under consideration, he says:

Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, "The jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to *nem. con.*

The section thus then read:

The judicial power shall extend to all cases arising under, etc.

The Constitution itself now reads:

The judicial power shall extend to all cases in law and equity arising under, etc.

"The judicial power," intended by the framers when making the said Amendment was the judicial power of the United States, both in law and equity, as mentioned in section 3, of article 11 of the draft, which, as previously amended, thus read at that particular moment:

The judicial power of the United States both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.

It is thus clear the framers expressly intended that the judicial power of the United States should *not* extend to constitutional cases of an *extrajudicial* nature arising under the new Constitution. It is equally clear, however, that they expressly intended that the said judicial power should positively extend to constitutional cases of a "judiciary" or, as we would now say, justiciable nature arising under the Constitution. There was no doubt among the framers upon this head. Their only anxiety was to prevent the jurisdiction of the Supreme Court from extending to constitutional cases of an extra-judicial nature.

Twice in the history of this country the wisdom of Madison's fears that the judiciary might mingle in extrajudicial controversies have been vindicated. Each case has been an impressive example of how unworkable our institutions would have been if the judicial branch of the Government had exercised any general revisory power over the acts of Congress.

In the first of these instances, the Dred Scott case, a majority of this court attempted to settle the vexed question of slavery by nullifying a legislative measure that had been in existence for many years—the Missouri Compromise. Possibly no one cause besides slavery did more to precipitate the Civil War, with all its ghastly consequences, than the Dred Scott decision. It is easy now to see that the Missouri Compromise had passed beyond the realms of judicial controversy, and that adherence to it was a political question, and, therefore, extrajudicial.

The second case was the Electoral Commission of 1877, and while it is true that it may have averted another Civil War, yet the fact remains that the participation by the majority of this court in an extrajudicial controversy to determine the facts of a disputed Presidential election sensibly weakened for a time its moral authority, and no one would now justify it, except on the ground that it was a temporary expedient.

Such a result would inevitably follow if this court were to exceed its delegated duty to apply the Constitution and the laws to concrete cases by attempting in advance to decide abstract questions of constitutional law, especially when such questions affect or involve grave political differences between large classes of the American people.

Similarly for this court to set aside the woman's suffrage Amendment, after it has become an accomplished fact, would be to cause the very greatest dissension, because the question of its adoption was

essentially a political one, and after acute and, indeed, acrimonious difference of opinion, the Congress of the United States by a two-thirds vote proposed the Amendment and the political authorities of more than three-fourths of the States formally certified that their legislatures had ratified it. This was an adjudication by the people as to their right to amend the Constitution in this way, and for this court to nullify so preponderating an expression of popular will, and especially upon disputed questions of fact as to the manner in which 3 States out of 38 ratified the Amendment, would be to decide an extrajudicial question, and, as I have tried to show, the framers of the Constitution never intended such an assumption of authority.

VII.

Except only as limited in Article V, the Constitution may be amended in any respect deemed advisable.

The framers of our Constitution realized most thoroughly that political institutions are subject to change. While the Articles of Confederation had provided that —

* * * The Articles of this Confederation shall be inviolably observed by every State and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration shall be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State (Article XI),

less than 10 years after those Articles had been offered to the States for ratification the need for amending them had become apparent, the Annapolis Convention had met, and then in turn the Philadelphia Convention had assembled, had agreed that mere amendments to the Articles would be insufficient, and, going beyond their instructions and delegated authority, had framed and proposed an entirely new Constitution. All this, to repeat, was within ten years from the time when Congress had proposed to the States a plan for a "perpetual" union, and within seven years from the time when the last of those States—Maryland—had agreed to that plan.

Nor did the framers of the new Constitution propose that it be adopted in accordance with the procedure laid down by the Articles of Confederation. The Constitution was in the first instance proposed by the Convention rather than by Congress;¹ it was ratified by conventions rather than by the State legislatures, and it provided that—

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same—

instead of requiring the assent of the legislatures of every State.²

¹ Congress, it is true, did on Sept. 28, 1787, direct that the proposed Constitution "be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention," but Article VII had not required that the Constitution be proposed by Congress.

² As is well known, North Carolina and Rhode Island did not enter the Union until after Washington had been inaugurated.

The Constitution, then, was a revolutionary change in the form of government, adopted in clear contravention of the strict rules laid down for the amendment of the Articles of Confederation. *The recent experience of the country had shown most unmistakably to the men of 1787 that if a government is to endure it must be possible to change the Constitution without waiting for unanimous consent.*

The new Constitution expressly provided that Amendments to it might be made. But it did far more than that. The discussions in the Constitutional Convention show clearly that the framers were anxious to make this provision effective and that for that reason they took pains to establish alternative methods of revising the Constitution.³ They so framed Article V as to make it impossible for either Congress or the State legislatures to prevent the submission of Amendments and to make it impossible for State legislatures to obstruct absolutely any changes in the Constitution which might limit the powers of the legislatures. The power to propose Amendments was given to Congress but Congress was also directed to call a convention for proposing Amendments on application of the legislatures of two-thirds of the States, and it was provided that proposed Amendments should

be valid to all intents and purposes, as part of this Constitution, when ratified by the legis-

³ The discussions are set forth in Watson on the Constitution, pp. 1305-1307. See also Bancroft, History of the Constitution of the United States, II, 215-217.

latures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

As Madison well said:

The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other. (The Federalist, No. 43.)

After the Convention the men who took most active part in securing the adoption of the Constitution freely admitted that defects in their plan might appear after the new government had come into existence. Madison said, in No. 43 of the Federalist:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided;

and Hamilton devoted most of his effort in the last number of the Federalist to showing that the amendment of the Constitution would not be unduly difficult.

Indeed, the Constitution would never have been ratified but for the prospect that it would be speedily amended to meet the objections which were raised in

a number of the States. The first ten Amendments were submitted by the First Congress at its first session, and the widespread demand for them was shown by the promptness with which they were ratified.

In short, the provisions of Article V which authorize Amendments were placed there after the experience of the country had shown their need most clearly; they were carefully devised for the purpose of making possible any change in our system of government for which there was a sufficiently strong demand throughout the country; and but for their presence in the Constitution the Constitution would never have been adopted. They are essential and important portions of the Constitution, entitled to such a construction as will secure the ends which were sought when they were made part of the supreme law of the land.

It is a popular error, due to the vivid and dramatic imagination of historians, that when the Constitution was completed its members were convinced as to its perfection.

Bancroft has a striking phrase stating that the members were "awe struck" with the result of their deliberation. The very contrary is true. A considerable number would not even sign it. Many members had left in disgust before the convention had adjourned. Only the powerful influence of Washington and the conciliatory wit of Franklin induced enough delegates to sign to give the appearance of unanimity. While it was signed as the unanimous act of the participating States, there was no approach to unanimity among the delegates.

They parted company agreed upon one thing, and one thing only, and that was that the Constitution was an imperfect instrument, and that Amendments were imperative. As all great master builders, truly they "builded better than they knew." The work was greater than even the most sanguine dreamed.

I mention this only because of its bearing upon the scope of the power to amend. The framers were not unmindful of the great importance to the new Government of the character of suffrage in the States. They had debated the subject as to the character of the electorate and the form of suffrage for many hours. (Madison's Debates, Aug. 7, 1787.) When, therefore, they provided a method for amending the Constitution they could not have been unmindful of the fact that there were wide differences of opinion as to the laws with respect to the suffrage.

When, therefore, they conferred a sweeping power of amendment, only expressly limited by three reservations, as to equal representation of the Senate and questions of taxation, they must have meant that no other limitation could be imposed upon the power of amendment. Indeed it is not too much to say that, having in mind the short-lived Confederation and the very grave doubts which even the wisest—as Washington, Franklin, Madison, and Hamilton—had with respect to the workability and permanency of the Constitution which they had adopted as a compromise, that they did not exclude from

the power of amendment a complete reconstruction of the whole Government, if such a course became necessary. Hence the provision for a general convention whenever two-thirds of the States so requested.

VIII.

Relief asked as to the Attorney General.

Section 2 of the Nineteenth Amendment provides:

Congress shall have power to enforce this article by appropriate legislation.

The relief prayed against the Attorney General is that he be enjoined from enforcing the Amendment. (Bill, Rec. 14.) The only allegation of contemplated action, however, is that—

if the above measure (Senate bill 4323, providing fine and imprisonment for any person who refuses to allow women to vote) should be passed, the second mentioned defendant, A. Mitchell Palmer, as Attorney General of the United States, would be empowered and required by law to enforce the provisions of said act * * *. (Bill, Par. XXVII, Pt. 2, Rec. 12.)

The bill in question was introduced in the Senate on May 4, 1920, which was during the second session of the Sixty-sixth Congress, by Senator Watson, of Indiana, and was referred to the Committee on the Judiciary. (Cong. Rec., vol. 59, pt. 7, p. 6494.) It was never reported out of committee during the Congress.

As yet Congress has passed no legislation looking to the enforcement of the Nineteenth Amendment.

Clearly no case is presented against the Attorney General.

CONCLUSION.

The appeal should be dismissed or the decree of the Court of Appeals affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Attorney.

W. MARVIN SMITH,
Assistant Attorney.

January, 1922.

APPENDIX A.

PROCLAMATION OF NINETEENTH AMENDMENT.

BAINBRIDGE COLBY, SECRETARY OF STATE OF THE
UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Know ye, that the Congress of the United States at the first session, Sixty-sixth Congress, begun at Washington on the nineteenth day of May in the year one thousand nine hundred and nineteen, passed a resolution as follows, to wit:

Joint Resolution proposing an Amendment to the Constitution extending the right of suffrage to women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an Amendment to the Constitution which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"ARTICLE —.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

And, further, that it appears from official documents on file in the Department of State that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas

Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

And, further, that the States whose legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, Bainbridge Colby, Secretary of State of the United States, by virtue and in pursuance of section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this 26th day of August, in the year of our Lord one thousand nine hundred and twenty.

[SEAL.]

BAINBRIDGE COLBY.

APPENDIX B.

RATIFICATIONS OF NINETEENTH AMENDMENT SUBSEQUENT TO PROCLAMATION OF ITS ADOPTION.

DIVISION OF PUBLICATIONS,

DEPARTMENT OF STATE,

Washington, December 28, 1921.

HON. JAMES M. BECK,

Solicitor General, Department of Justice.

SIR: In response to your letter of December 27th, I am directed by the Secretary of State to advise you

that since the announcement of the Secretary of State, dated 26th August, 1920 (a copy of which is herewith enclosed), that the Amendment to the Constitution extending the right of suffrage to women has become valid to all intents and purposes as a part of the Constitution of the United States, the Amendment has since been ratified by the State of Connecticut and the State of Vermont.

The records of this department show two records to have been transmitted by the State of Connecticut, the first advising that the resolution of ratification had been passed by the senate and the house of representatives on September 14th, 1920, the other, that the resolution had been passed by the senate and house of representatives on September 21, 1920. The first record was certified by the secretary of state of the State of Connecticut, on September 14, 1920, the second on October 15, 1920.

The resolution of the State of Vermont ratifying the Amendment was passed by the senate and house of representatives on February 8, 1921, approved by the governor on February 9, 1921, and certified by the secretary of state of the State of Vermont to this department on February 10, 1921.

I am, sir,

Your obedient servant,

JAMES L. DUNCAN,
Acting Chief of Division.

APPENDIX C.

PROCLAMATION OF FOURTEENTH AMENDMENT ON
JULY 20, 1868.

WILLIAM H. SEWARD, SECRETARY OF STATE OF THE
UNITED STATES.

To all to whom these presents may come, greeting:

Whereas the Congress of the United States, on or about the sixteenth of June, in the year one thousand eight hundred and sixty-six, passed a resolution which is in the words and figures following, to wit:

“Joint resolution proposing an Amendment to the Constitution of the United States.

“Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring), That the following article be proposed to the legislatures of the several States as an Amendment to the Constitution of the United States, which when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

“ARTICLE XIV.

“SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

"SECTION 4. The validity of the public debt of the United States, authorized by law, including debt incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United

States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"SCHUYLER COLFAX,

"Speaker of the House of Representatives.

"LA FAYETTE S. FOSTER,

"President of the Senate pro tempore.

"Attest:

"EDWD. MCPHERSON,

"Clerk of the House of Representatives.

"J. W. FORNEY,

"Secretary of the Senate."

And whereas by the second section of the act of Congress, approved the twentieth of April, one thousand eight hundred and eighteen, entitled "An act to provide for the publication of the laws of the United States, and for other purposes," it is made the duty of the Secretary of State forthwith to cause any Amendment to the Constitution of the United States, which has been adopted according to the provisions of the said Constitution, to be published in the newspapers authorized to promulgate the laws, with his certificate specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States;

And whereas neither the act just quoted from, nor any other law, expressly or by conclusive implication, authorizes the Secretary of State to determine

and decide doubtful questions as to the authenticity of the organization of State legislatures, or as to the power of any State legislature to recall a previous act or resolution of ratification of any Amendment proposed to the Constitution;

And whereas it appears from official documents on file in this department that the Amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa;

And whereas it further appears from documents on file in this department that the Amendment to the Constitution of the United States, proposed as aforesaid, has also been ratified by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama;

And whereas it further appears from official documents on file in this department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid Amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or of either of them, to the aforesaid Amendment;

And whereas the whole number of States in the United States is thirty-seven, to wit: New Hamp-

shire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Vermont, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, Michigan, Florida, Texas, Iowa, Wisconsin, Minnesota, California, Oregon, Kansas, West Virginia, Nevada, and Nebraska;

And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed Amendment, and the six States next thereafter named, as having ratified the said proposed Amendment by newly constituted and established legislative bodies, together constitute three-fourths of the whole number of States in the United States:

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress, approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that if the resolutions of the Legislatures of Ohio and New Jersey ratifying the aforesaid Amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid Amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this twentieth day of July, in the year of our Lord one thousand

eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[L. S.] WILLIAM H. SEWARD, *Secretary of State*.

APPENDIX D.

PROCLAMATION OF FOURTEENTH AMENDMENT ON JULY 28, 1868.

WILLIAM H. SEWARD, SECRETARY OF STATE OF THE
UNITED STATES.

To all to whom these presents may come, greeting:

Whereas by an act of Congress passed on the twentieth of April, one thousand eight hundred and eighteen, entitled, "An act to provide for the publication of the laws of the United States and for other purposes," it is declared that whenever official notice shall have been received at the Department of State that any Amendment which heretofore has been and hereafter may be proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, it shall be the duty of the said Secretary of State forthwith to cause the said Amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid to all intents and purposes as a part of the Constitution of the United States.

And whereas the Congress of the United States, on or about the sixteenth day of June, one thousand eight hundred and sixty-six, submitted to the legislatures of the several States a proposed Amendment to the Constitution in the following words, to wit:

^aJoint resolution proposing an Amendment to the Constitution of the United States.

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following article be proposed to the legislatures of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

"ARTICLE XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole

number of male citizens twenty-one years of age in such State.

"SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

"SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"SCHUYLER COLFAX,

"Speaker of the House of Representatives.

"LA FAYETTE S. FOSTER,

"President of the Senate pro tempore.

"Attest:

"EDWD. MCPHERSON,

"Clerk of the House of Representatives.

"J. W. FORNEY,

"Secretary of the Senate."

And whereas the Senate and House of Representatives of the Congress of the United States, on the twenty-first day of July, one thousand eight hundred and sixty-eight, adopted and transmitted to the Department of State a concurrent resolution, which concurrent resolution is in the words and figures following, to wit:

"IN THE SENATE OF THE UNITED STATES,

"July 21, 1868.

"Whereas the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, Ohio, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the Fourteenth Article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress; therefore,

"Resolved by the Senate (the House of Representatives concurring), That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.

"Attest: GEO. C. GORHAM, *Secretary.*

"IN THE HOUSE OF REPRESENTATIVES,

July 21, 1868.

"Resolved, That the House of Representatives concur in the foregoing concurrent resolution of the Senate 'declaring the ratification of the Fourteenth

Article of Amendment of the Constitution of the United States.'

"Attest:

EDWD. MCPHERSON, *Clerk.*"

And whereas official notice has been received at the Department of State that the legislatures of the several States next hereinafter named have, at the times respectively herein mentioned, taken the proceedings hereinafter recited upon or in relation to the ratification of the said proposed Amendment, called article fourteenth, namely:

The legislature of Connecticut ratified the Amendment June 30th, 1866; the legislature of New Hampshire ratified it July 7th, 1866; the legislature of Tennessee ratified it July 19th, 1866; the legislature of New Jersey ratified it September 11th, 1866, and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it; the legislature of Oregon ratified it September 19th, 1866; the legislature of Texas rejected it November 1st, 1866; the legislature of Vermont ratified it on or previous to November 9th, 1866; the legislature of Georgia rejected it November 13th, 1866, and the legislature of the same State ratified it July 21st, 1868; the legislature of North Carolina rejected it December 4th, 1866, and the legislature of the same State ratified it July 4th, 1868; the legislature of South Carolina rejected it December 20th, 1866, and the legislature of the same State ratified it July 9th, 1868; the legislature of Virginia rejected it January 9th, 1867; the legislature of Kentucky rejected it January 10th, 1867; the legislature of New York ratified it January 10th, 1867; the legislature of Ohio ratified it January 11th, 1867, and the legislature of the same State passed a resolution in January,

1868, to withdraw its consent to it; the legislature of Illinois ratified it January 15th, 1867; the legislature of West Virginia ratified it January 16th, 1867; the legislature of Kansas ratified it January 18th, 1867; the legislature of Maine ratified it January 19th, 1867; the legislature of Nevada ratified it January 22d, 1867; the legislature of Missouri ratified it on or previous to January 26th, 1867; the legislature of Indiana ratified it January 29th, 1867; the legislature of Minnesota ratified it February 1st, 1867; the legislature of Rhode Island ratified it February 7th, 1867; the legislature of Delaware rejected it February 7th, 1867; the legislature of Wisconsin ratified it February 13th, 1867; the legislature of Pennsylvania ratified it February 13th, 1867; the legislature of Michigan ratified it February 15th, 1867; the legislature of Massachusetts ratified it March 20th, 1867; the legislature of Maryland rejected it March 23d, 1867; the legislature of Nebraska ratified it June 15th, 1867; the legislature of Iowa ratified it April 3d, 1868; the legislature of Arkansas ratified it April 6th, 1868; the legislature of Florida ratified it June 9th, 1868; the legislature of Louisiana ratified it July 9th, 1868; and the legislature of Alabama ratified it July 13th, 1868.

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, in execution of the aforesaid act, and of the aforesaid concurrent resolution of the 21st of July, 1868, and in conformance thereto, do hereby direct the said proposed Amendment to the Constitution of the United States to be published in the newspapers authorized to promulgate the laws of the United States, and I do hereby certify that the said proposed Amendment has been adopted in the manner

hereinbefore mentioned by the States specified in the said concurrent resolution, namely, the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and also by the legislature of the State of Georgia; the States thus specified being more than three-fourths of the States of the United States.

And I do further certify that the said Amendment has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL.]

WILLIAM H. SEWARD,

Secretary of State.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES S. FAIRCHILD, APPELLANT, v. CHARLES E. HUGHES, AS SECRETARY OF State of the United States, and Harry M. Daugherty, as Attorney General of the United States, appellees.	}	No. 148.
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APPEAL FROM COURT OF APPEALS, DISTRICT OF COLUMBIA.

MOTION TO DISMISS OR AFFIRM.

The Solicitor General moves the court to dismiss the appeal or affirm the decree in the above-entitled cause.

As grounds for this motion it is shown—

STATEMENT.

Without raising a direct issue on a specific statement of facts, but as a citizen and resident of the State of New York, and on behalf of himself and the members (who are taxpayers) of the American Constitutional League, organized "to uphold and defend the American Constitution against all foreign and domestic enemies" (Tr. 2), appellant, on July 7, 1920, filed an original bill in the Supreme Court of the Dis-

trict of Columbia for an injunction against the Secretary of State, his assistants, subordinates, and agents, to enjoin him and them from issuing any proclamation declaring "that the said so-called Suffrage Amendment has been ratified or that it has become a part of the Constitution of the United States" (Tr. 14).

On July 14, 1920, the Supreme Court of the District of Columbia dismissed the bill on final decree (Tr. 16). An appeal was allowed to the Court of Appeals.

On August 26, 1920, the Secretary of State issued the proclamation of the ratification of the nineteenth amendment, an event of which the court will take judicial notice, which was in full force and effect when the elections were held in November, 1920 (Tr. 21).

On October 4, 1920, the Court of Appeals affirmed the decree of the Supreme Court of the District of Columbia on authority of *Widenmann v. Colby*. (See similar motion, No. 92, this term, now pending (Tr. 40 and 41). This appeal was taken.

ARGUMENT.

Section 250, Judicial Code, provides:

Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

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Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

* * * * *

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

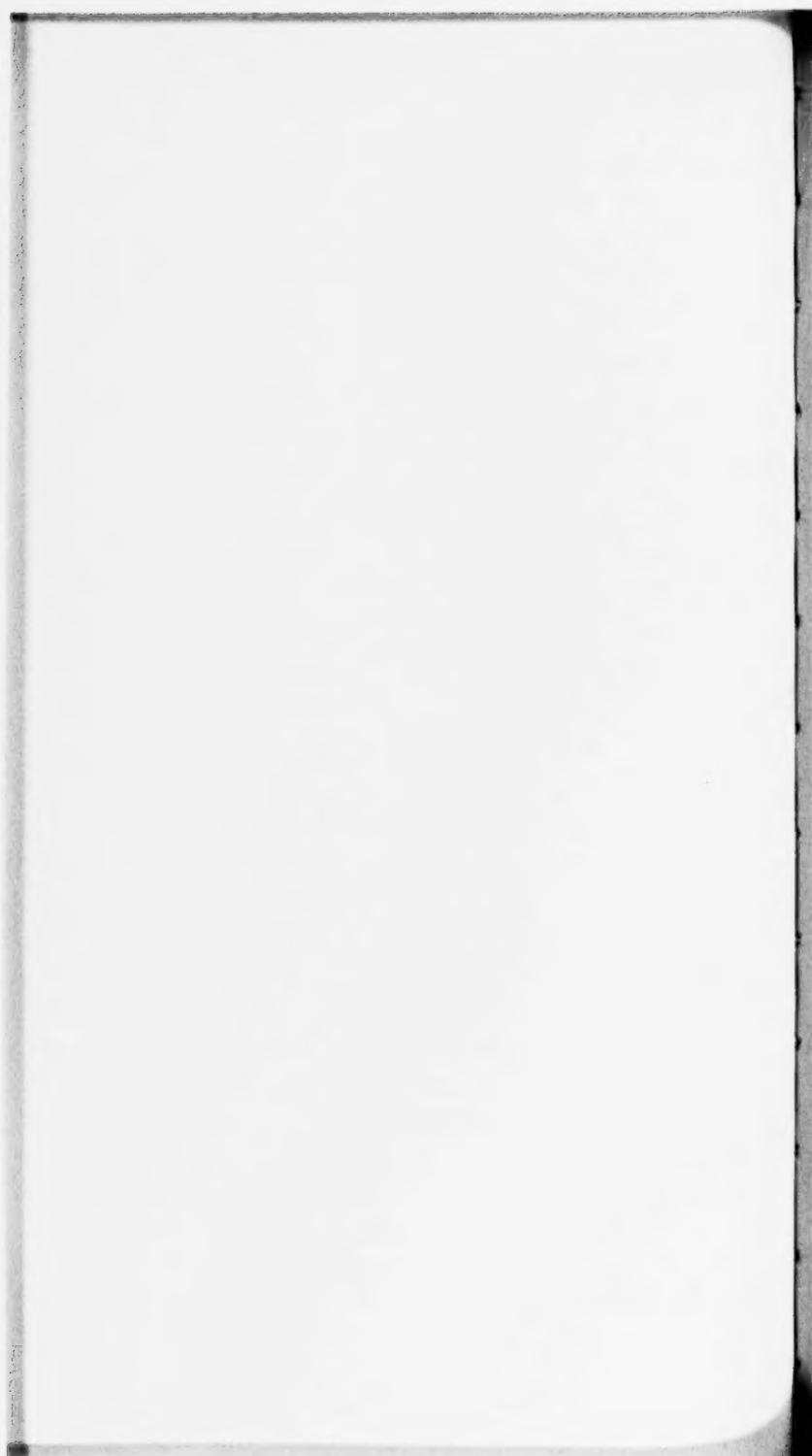
Only a moot question is presented. Plaintiff in error has shown no interest which involves the construction or application of the Constitution, or the validity or construction of any treaty, or the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States, or the construction of any law of the United States. The court will not decide "moot questions or abstract propositions." *California v. San Pablo & Tulare R. R. Co.* (149 U. S. 308, 314); *Taylor v. Taft* (203 U. S. 461); *Wilson v. Shaw* (204 U. S. 24); *Champion Lumber Co. v. Fisher* (227 U. S. 445); *United States v. Hamburg-American S. S. Co.* (239 U. S. 466, 475); *United States v. American-Asiatic S. S. Co.* (242 U. S. 537); *United States v. Alaska S. S. Co.* (253 U. S. 113).

JAMES M. BECK,

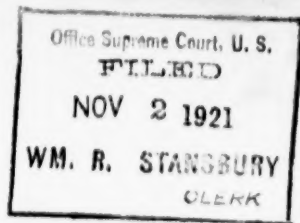
Solicitor General.

NOVEMBER, 1921.





26



IN THE
Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

vs.

CHARLES E. HUGHES, as Secretary
of State of the United States,

and

HARRY M. DAUGHERTY, as Attor-
ney - General of the United
States.

October
Term, 1921.
No. 148.

Motion to Advance.

Now comes the appellant, Charles S. Fairchild, by Everett P. Wheeler, his attorney and counsel in this case, and respectfully moves the Court to advance this case on the docket of the Court and grant an early hearing thereunder, consecutively with the case; Oscar Leser *et al. vs. J. Mercer Garnett et al.*, No. 553 on the docket of the Court, for the following reasons:

1. Similar questions under the Constitution of the United States and involving the construction and application thereof as affecting the validity of the so-called Nineteenth Amendment and the application thereto of the Ninth and Tenth Amendments arise in both cases.

2. This case was brought in the Supreme Court of the District of Columbia before the Secretary of State issued his proclamation declaring the ratification of the Nineteenth Amendment by three-fourths of the States under Article V. of the Constitution. It was brought to restrain him from issuing the proclamation declaring such ratification and to restrain the Attorney-General of the United States from enforcing the provisions of the said amendment if it should be declared by the Secretary of State to have been ratified by three-fourths of the States and to have become an integral part of the Constitution of the United States. Process was served upon the Secretary of State and on the Attorney General before the said proclamation was issued and the Court has power which it should exercise to direct the Secretary of State to rescind the proclamation of ratification which he made *pendente lite* and with knowledge that the suit was brought to enjoin him from so doing. This proclamation now appears upon the official edition of the laws of the United States and is *prima facie* evidence of the existence and validity of the said Nineteenth Amendment.

3. The appeal in this case involves fundamental questions of Constitutional law, which it is in the interest of the people of the United States and of

the Government thereof to have finally decided and at an early day.

4. It involves the question whether the ratification of the Constitution by the thirteen original States was upon the condition that certain amendments to constitute a Bill of Rights should be adopted and become an integral part of that instrument, and should express fundamental rights of the States and the citizens thereof which could not be divested in the case of any State except by its consent.

5. It involves the question whether a State can be said to have the Republican form of government which is guaranteed by Section 4, Article IV. of the Constitution, when, without its consent, it is deprived of the right to regulate the suffrage within that State for the officers thereof.

6. It involves the question whether the said Nineteenth Amendment is beyond the scope of the power to amend, conferred by Article V. of the Constitution, and it involves an examination into the validity of the ratification of the Nineteenth Amendment by numerous State Legislatures. The Secretary of State held that he had no power to enquire into the validity of any such ratifications and refused to examine the same.

7. It is of great importance to each State in the Union and to the conduct by the election officers of elections therein that the validity of the said Nineteenth Amendment as a part of the Constitution of the United States should be determined before the general election which will be held in the said States in the month of November, 1922.

In support of this motion the appellant respectfully prays the consideration of the Court to the brief and to the supplemental brief heretofore filed in said case, No. 553, *Oscar Leser et al. vs. J. Mercer Garnett et al.*, in support of a petition by the plaintiffs in error therein for the issuance of a writ of certiorari. In these briefs many of the arguments upon the merits in both cases are stated at length. The other arguments in support of the appeal in this case will be stated fully in briefs to be filed hereafter on behalf of the appellant.

EVERETT P. WHEELER,
For Appellant.

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Office Supreme Court, U. S.
FILED

OCT 11 1920

JAMES D. WAHER,
CLERK.

SUPREME COURT OF THE UNITED
STATES.

OCTOBER TERM, 1920.

CHARLES S. FAIRCHILD,
Appellant,

v.

BAINBRIDGE COLBY, as Secretary
of State of the United States,
and A. MITCHELL PALMER, as
Attorney General of the United
States.

No. 148

Now comes the Appellant by Everett P. Wheeler, William L. Marbury and Alfred D. Smith, his attorneys, and moves the Court to advance the hearing of the appeal in this cause to such day as shall be fixed by this Court.

The following is a brief statement of the matter involved with the reasons for the application:

The plaintiff is President of the American Constitutional League, composed of members who are citizens and tax payers in ten States. On their behalf he filed his bill in the Supreme Court of the District of Columbia July 7, 1920. The Defendants appeared and moved to dismiss the bill July 13, 1920. A decree dismissing the bill was entered July 14, 1920. On the same day an appeal

was noted to the Court of Appeals. That Court on the 4th day of October affirmed the decree and Plaintiff immediately appealed to this Court.

The suit was brought to enjoin the Defendant, the Secretary of State, from issuing a proclamation declaring the ratification of this so-called Amendment, and to enjoin the Defendant, the Attorney General, from taking proceedings to enforce it.

The suit is based on these propositions:

1. The so-called Amendment limits the power of each State to regulate the suffrage for the offices of the State government. This right is a fundamental part of a republican form of government and of the rights reserved to the several States by the Ninth and Tenth Amendments. These amendments are a bill of rights which limit the power of amendment given in Article V.

2. The Amendment is therefore in violation of the guaranty of a republican form of government in Article IV, Section 4 of the Constitution.

3. The ratification of the Amendment by Missouri, West Virginia and Tennessee was a violation of the Constitutions of those States and not a lawful exercise of the power of the Legislature. These ratifications are therefore invalid.

Haire v. Rice, 204 U. S. 294.

4. The action of the Secretary of State, in issuing the proclamation is ministerial only. He has no power to ascertain either the facts or the law as to any ratification. Yet his proclamation is *prima facie* valid, and is treated as such in many States of the Union. The Court should therefore decide the controversy as to its validity.

5. The enforcement of the proclamation would work irretrievable injury to the members of the Association both as voters and as taxpayers. It could not be measured or compensated in damages and would give rise to a multiplicity of suits.

Inasmuch as the Defendant, the Secretary of State, pending the litigation and with full knowledge of it, has issued the proclamation of ratification, Plaintiff now asks a decree that he be required to revoke said proclamation and to issue a proclamation declaring that said Amendment has not been duly ratified and has not become a part of the Constitution of the United States.

The appeal involves the question whether the said Amendment, mentioned in the bill of complaint, is a constitutional exercise of the power to amend the Constitution, conferred by Article V thereof. It also involves the question as to whether the proposed amendment has been duly ratified in a legal and constitutional manner by the Legislatures of thirty-six States of the Union.

The questions of law incidentally involved are more fully stated in the briefs for the Appellant, which were filed in the Court of Appeals on the 9th day of September, 1920. Appellant also filed a brief in reply to the point made that the proclamation had been issued *pendente lite*.

These questions are of great public importance and it is very desirable in the public interest to have them disposed of, if possible, during the present month of October.

Counsel are aware of the order the Court has made respecting the advancement of the argument of several causes on the docket. But they respectfully submit that this cause, involving as it does the exercise of the elective franchise in many States, should have as early consideration as the

Court can allow. The questions involved relate to the election to be held in November. It is true they relate to all subsequent elections and also to the extent of the power of amendment conferred by Article V. If a majority of the States, under color of a federal amendment, can change the local government of the other States against their will, this would cease to be a federal republic. The power to amend would become the power to destroy.

These questions have not been determined by this Court. They deserve most careful consideration. Appellant is not responsible for the emergency which has arisen.

This Court is now asked, in the exercise of its highest prerogative, to protect the civil rights of citizens and taxpayers against the unauthorized acts of those claiming to represent them.

EVERETT P. WHEELER,
WILLIAM L. MARBURY,
ALFRED D. SMITH,
of Counsel for Appellant.

Office Supreme Court, U. S.

FILED

JAN 28 1922

WM. R. STANSBURY

CLERK

IN THE

Supreme Court of the United States.

CHARLES S. FAIRCHILD,
Appellant,

against

CHARLES E. HUGHES, as Secretary
of State of the United States,

and

HARRY M. DAUGHERTY, as Attorney-General of the United
States,

Appellees.

October Term,
1921.

No. 148.

MEMORANDUM IN REPLY, PRESENTED AND FILED ON BEHALF OF APPELLANT BY LEAVE OF THE COURT,

being

A Consideration of Several Cases.

Appellant's Brief, Point 11, page 46 and Brief Supplemental thereto, also involve this question in part.

Appellees contend in their brief, Point VI, that the question raised by Appellant is beyond the scope of the Judicial power.

It is conceded that the Judiciary is without power to decide political questions.

It is contended, however, that no one of the cases cited in the various briefs, is authority for the proposition that to construe the guaranty to every State of a Republican Form of Government, as constituting a contract justiciable in this Court, would constitute any innovation, or involve any departure from or limitation of, former rulings in this Court.

The cases may be grouped as follows:—

Luther vs. Borden, 7 How. 42 cited in *Taylor vs. Beckham No. 1*, 178 U. S. 548, as commented upon in *Pacific Telephone Co. vs. Oregon*, 223 U. S. 149 (Mr. Ch. J. White). “Speaking through Mr. Chief Justice Fuller”,—“In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department.” In all these cases a conflict had arisen within a State, and nowhere has it been determined that the United States may overthrow the form of any existing government either *de facto* or *de jure* and substitute another. Still less that it may establish a new rule where no controversy or disorder has arisen.

Mississippi vs. Johnson, 4 Wallace 475-498, wherein the Court limited its decision to the single point “Can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?” Mr. Chief Justice Chase expressly so declares and all concur.

Georgia vs. Stanton, 6 Wallace 50, wherein Mr. Justice Nelson writes an opinion. Mr. Chief Jus-

Justice Chase concurs in the conclusion "that the case made by the bill, is one of which this Court has no jurisdiction."

Thereupon the decision was:—

"Bill dismissed for want of Jurisdiction."

Nothing more was decided in that case, than was involved and contended, viz:—(page 53).

Following war and military occupation, the Secretary of War, the General commanding the Army and the General in command of a district, will not be enjoined from:—

1. Issuing any order, etc. as might be required under certain Acts of Congress, there involved.
2. Causing to be made any registration pursuant thereto.
3. Administering any oath thereunder.
4. Holding any election, as provided therein.

The acts in question recited "that no legal State Governments or adequate protection for life or property existed in States of Virginia, etc. *Georgia* etc. and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established" "divided the States named into five military districts" etc. (p. 50).

"It made it the duty of this officer to protect etc. *either* through the local tribunals or through military commissions" etc. (p. 51).

"It provided, further, that when the people of one of these States had framed a constitution in conformity with that of the United States, framed by delegates elected by male citizens, etc. of twen-

ty-one years of age and upwards of whatever race, color or previous condition" etc. " 'except such as may be disfranchised for participation in the rebellion' etc. and when such constitution should have been ratified by a majority etc. and Congress should have approved the same etc. and when the State by its legislature etc. should have ratified, etc. etc., then that the States respectively should be declared entitled to representation in Congress etc. and that until they were so admitted, any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control or supersede them."

"The second of the two acts related chiefly to registration" etc.

Georgia vs. Stanton accordingly decides:—

First.—That the Court had no jurisdiction to grant the relief prayed therein. The Chief Justice points out that the reasons set forth in the opinion are not necessary to the decision.

Second.—The Court will not enjoin the Secretary of War and Generals of the Army from conducting a referendum in a State which has been conquered and is held by military force, when that referendum is of the character described and for the purposes set forth.

Furthermore the acts there drawn in question show that Congress determined

1. That those acts were part of the war power.
2. That the procedure was justified solely as a war measure.

3. That a continuation of a war status pending a carrying out of the provisions of the acts, was necessary to prevent the arising of a *de facto* government which should become *de jure* and thereby oust Congress under the Constitution of all control.

4. That such status, as conquered territory might be perpetuated by a provision of the acts, to the effect that any civil government which might exist therein should be deemed provisional only, thereby cutting off all possibility of prescriptive right through lapse of time.

An application of the facts of that case and the implications therefrom, to the facts of the present case, is destructive of the contentions made on the part of the Appellees.

Rhode Island vs. Massachusetts as summarized in *Georgia vs. Stanton*, is worthy of notice.

Mr. Justice Nelson writes: (p. 72) "Mr. Justice Baldwin (12 Peters 736) etc. "As it is viewed by the Court, on the Bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on Bill and Plea, the question is, whether the stake set upon Wrentham plain by Woodward and Saffrey, in 1842 is the true point from which to run an east and west line as the compact boundary between the States—In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid, neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals."

The present inquiry involves the construction of a written instrument, a contract of guaranty, and depends upon "the law of equity" applicable thereto:—competent parties good and valuable consideration, good faith, a meeting of minds and all the other elements of a good, valid equitable and meritorious agreement being present.

Again at page 73, Mr. Justice Nelson writes:—

"He (Mr. Justice Baldwin) endeavored to show, and, we think did show, that the question was one of boundary, which of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case."

In that case the State of Rhode Island did not *own* the land involved and the question was one of boundary and jurisdiction by reason of a reserved sovereignty.

The question under the law of contracts is chief and controlling in the case at bar. It is one which may be determined as matter of law. There is no question of fact and the subject of the *franchise* is merely subsidiary, the occasion for the arising of the issue to be sure, but insignificant by comparison, with the determination of that great question,—following as a mere corollary, a solution of the main problem.

Questions arising by reason of contracts are the direct antitheses of political questions.

The two classes are mutually exclusive each of the other.

Contracts are determined by Courts, as matter of law. There is no room for political action.

for the contract is wholly without,—external to,—the political body. Political action results and eventuates in a contract, but the contract is not political, when made, nor is its construction or are the rights of the other party thereto.

Political action on the other hand is internal to the political body,—a part of its vital life and function,—and has no scope or effect beyond the bounds of the political power of the body concerned. All outside relations are governed by law or diplomacy as the case may be, a rule well understood and fully recognized in matters international.

From the Prohibition Amendment Cases, we may note as indicated by Judge Rellstab below, that a guaranty in the Constitution should be liberally construed to effect its purpose. "Words in the Constitution of the United States do not ordinarily receive a narrow and contracted meaning but are presumed to have been used in a broad sense with a view of covering all contingencies; In re *Strauss*, 197 *U. S.* 324—"The traffic in intoxicating liquor stands on an entirely different footing from the commerce in ordinary commodities" following Mr. Justice Harlan, in *Mugler vs. Kansas*, 123 *U. S.* 623, 662.

Thereupon Judge Rellstab proceeds:

"To declare an amendment so ordained void on the ground that it runs counter to the implied limitations arising from the original document is fraught with such dire possibilities that the power so to do by any other than the political departments of the government, may be well doubted."

Figenspan vs. Bodine, Record on Appeal to the Supreme Court, pp. 61, 63, 64 and 67.

But so far as concerns the present inquiry, it is not necessary to hold or intimate anything whatsoever respecting *implied* limitations.

In *South Carolina vs. United States*, 199 U. S., p. 454, Mr. Justice Brewer writes:

"In other words, in this indirect way, it would be within the competency of the States to practically destroy the efficiency of the National Government," etc.

"Each State is subject only to the limitations prescribed by the Constitution, and within its own territory it is otherwise supreme. Its internal affairs are matters of its own concern—The Constitution provides that the United States shall guarantee to every State a Republican Form of Government, Article 4, Section 4. That expresses the full limit of control over the internal affairs of a State."

If this Court shall give effect to the view so expressed by Mr. Justice Brewer, the decision of the main question whenever had, must be as contended by appellant.

In *Texas vs. White*, 7 Wallace, p. 237, Mr. Chief Justice Chase speaking for the Court declared:

"It is not unreasonably said that the preservation and maintenance of their (the State) Governments are as much within the design and care of the constitution, as the preservation of the Union, and maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union of indestructible States."

In *Lane County vs. Oregon*, 7 Wallace 71, 76, Mr. Chief Justice Waite:

"Without the States in the Union there could be no such political body as the United States."

"To them nearly the whole charge of interior regulation is committed or left: to them and to the people all powers not expressly delegated to the National Government are reserved."

Counsel for Appellant, accordingly respectfully submits to the Court for determination, the question raised by counsel for Appellees as to whether the controversy presented herein is such that the Court may adjudicate the same as arising under the guaranty of a Republican Form of Government.

To mention a great world movement toward judicial determination of questions arising between or among governmental organizations would be a work of supererogation before this Tribunal.

The framers of the Constitution of the United States were far ahead of their day and generation, in making provision for judicial determination of such controversies, but different times supervened.

Were various *dicta* found in old opinions, to be rewritten in Washington today, much reference to "political determination" and its inevitable international and interstate consequences, might be greatly modified or even omitted.

Nevertheless, we have been a people most fortunate. The United States have possessed a Supreme Court, the Balkan States have had none.

All of which is respectfully submitted.

WALDO G. MORSE,
Of Counsel for Appellant.

[1792]

FAIRCHILD *v.* HUGHES, AS SECRETARY OF
STATE OF THE UNITED STATES, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 148. Argued January 23, 1922.—Decided February 27, 1922.

1. The general right of a citizen to have the government administered according to law and the public moneys not wasted does not entitle him to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment about to be adopted, will be valid. P. 129.
 2. Though in form a suit in equity, this is not a case within Art. III, § 2, of the Constitution. P. 129.
- Affirmed.

APPEAL from a decree of the court below affirming a decree of the Supreme Court of the District of Columbia, which dismissed a bill by which the appellant sought to have the Nineteenth Amendment declared unconstitutional and to enjoin the Secretary of State from proclaiming its ratification and the Attorney General from taking steps to enforce it.

Mr. William L. Marbury and *Mr. Thomas F. Cadwalader*, with whom *Mr. Everett P. Wheeler* and *Mr. Waldo G. Morse* were on the briefs, for appellant.

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Opinion of the Court.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder* and *Mr. W. Marvin Smith* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On July 7, 1920, Charles S. Fairchild of New York brought this suit in the Supreme Court of the District of Columbia against the Secretary of State and the Attorney General. The prayers of the bill are that "the so-called Suffrage Amendment [the Nineteenth to the Federal Constitution] be declared unconstitutional and void"; that the Secretary of State be restrained from issuing any proclamation declaring that it has been ratified; and that the Attorney General be restrained from enforcing it. There is also a prayer for general relief and for an interlocutory injunction. The plaintiff, and others on whose behalf he sues, are citizens of the United States, taxpayers and members of the American Constitutional League, a voluntary association which describes itself as engaged in diffusing "knowledge as to the fundamental principles of the American Constitution, and especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein."

The claim to relief was rested upon the following allegations: The legislatures of thirty-four of the States have passed resolutions purporting to ratify the Suffrage Amendment; and from one other State the Secretary of State of the United States has received a certificate to that effect purporting to come from the proper officer. The proposed Amendment cannot, for reasons stated, be made a part of the Constitution through ratification by the legislatures; and there are also specific reasons why the resolutions already adopted in several of the States are inoperative. But the Secretary has declared that he is

without power to examine into the validity of alleged acts of ratification, and that, upon receiving from one additional State the customary certificate, he will issue a proclamation declaring that the Suffrage Amendment has been adopted. Furthermore, "a force bill" has been introduced in the Senate which provides fine and imprisonment for any person who refuses to allow women to vote; and if the bill is enacted, the Attorney General will be required to enforce its provisions. The threatened proclamation of the adoption of the Amendment would not be conclusive of its validity, but it would lead election officers to permit women to vote in States whose constitutions limit suffrage to men. This would prevent ascertainment of the wishes of the legally qualified voters, and elections, state and federal, would be void. Free citizens would be deprived of their right to have such elections duly held; the effectiveness of their votes would be diminished; and election expenses would be nearly doubled. Thus irremediable mischief would result.

The Supreme Court of the District granted a rule to show cause why an interlocutory injunction should not issue. The return was promptly made; and the defendants also moved to dismiss the bill. On July 14, 1920, the rule was discharged; a decree was entered dismissing the bill; and an appeal was taken to the Court of Appeals of the District. The Secretary, having soon thereafter received a certificate of ratification from the thirty-sixth State, proclaimed, on August 26, 1920, the adoption of the Nineteenth Amendment. The defendants then moved to dismiss or affirm. The Court of Appeals affirmed the decree on the authority of *United States v. Colby*, 49 App. D. C. 358; 265 Fed. 998, where it had refused to compel the Secretary to cancel the proclamation declaring that the Eighteenth Amendment had been adopted. The grounds of that decision were that the validity of the Amendment could be in no way affected by an order

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Opinion of the Court.

of cancellation; that it depended on the ratifications by the States and not on the proclamation; and that the proclamation was unimpeachable, since the Secretary was required, under Rev. Stats., § 205, to issue the proclamation upon receiving from three-fourths of the States official notice of ratification and had no power to determine whether or not the notices received stated the truth. But we have no occasion to consider these grounds of decision.

Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See *In re Pacific Railway Commission*, 32 Fed. 241, 255, quoted in *Muskrat v. United States*, 219 U. S. 346, 356. The alleged wrongful act of the Secretary of State, said to be threatening, is the issuing of a proclamation which plaintiff asserts will be vain but will mislead election officers. The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the

Statement of the Case.

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federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid. Compare *Giles v. Harris*, 189 U. S. 475; *Tyler v. Judges of Court of Registration*, 179 U. S. 405.

Decree affirmed.